86-799

Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

JULIE FISHER

Appellant,

vs.

THE COPLEY PRESS INC., YVONNE LARSEN,

W. DANIEL LARSEN, JOSEPH HARMON,

EDWIN GRAY and MICHAEL SCOTT-BLAIR

Appellees

ON APPEAL FROM THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT

JURISDICTIONAL STATEMENT

Julie Fisher
3726 Charles Street,
San Diego,
California 92106
(619) - 223-6623
Appellant

QUESTIONS PRESENTED FOR REVIEW

I. Whether Section 48a of the California Civil Code is repugnant to the First and Fourteenth Amendments?

II. Whether the First and Fourteenth Amendments require that 'dishonest' statements of opinion be absolutely privileged?

III. Whether the First and Fourteenth Amendments require that media defendants have an absolute privilege to 'unfairly' republish libels?

IV. Whether the principle recognized in New York Times vs. Sullivan is double-edged, requiring protection of the public's sources of information and the would-be critic of government from the fear of intentional libel as well as from the fear of libel suits?

V. Whether the constitutional standard of review applies to the question of truth in public official defamation actions?

LIST OF ALL PARTIES

All parties to this cause appear in the caption of the case in this Court.

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CITATIONS TO OPINIONS BELOW

The California Court of Appeal, Fourth Appellate District, Division One, rendered two opinions in this case. The first (Appendix A-48) has been officially reported at 137 Cal. App. 3d 627. The second (Appendix A-1) was not reported in the official reports.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION IS BASED

A. Petitioner seeks review of the judgment of the Court of Appeal, State of California, Fourth Appelate District, Division One, filed on April 24, 1986 and of the previous Court of Appeal decision entered on March 25, 1983. A timely petition for a rehearing was denied without modification of the opinion.

A timely petition for a hearing, raising all matters urged here was rejected by an order of the California Supreme Court issued July 30, 1986 (Appendix A-102).

B. The highest Court of the State of California has finally determined the federal issues presented in this case.

C. Petitioner relies upon 28 U.S.C. paragraph 1257(2) to confer jurisdiction on the Court to review the judgment of the Court of Appeal. The first question challenges the validity of California Civil Code Section 48a on the ground of its being repugnant to the constitution, and the California Court of Appeal and the California Supreme Court have held it valid.

The other questions concern important issues of constitutional law which have not but should be decided by this Court.

CONSTITUTIONAL PROVISIONS INVOLVED IN CASE

United States Constitution Amendment I:
"Congress shall make no law...abridging the freedom of speech, or of the press; or

the right of people...to petition the Government for a redress of grievances."

United States Constitution Amendment XIV: "No State shall make of enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES INVOLVED IN THE CASE

California Civil Code section 48a, subdivision 1: "In any action for damages for the publication of a libel in a newspaper ....plaintiff shall recover no more than special damages unless a correction be demanded and be not published... as hereinafter provided. Plaintiff shall serve upon the publisher, at the place of publication...., a written notice specifying the statements claimed to be libelous and demanding the same be corrected. Said notice and demand must be served within 20 days after knowledge of the publication...of the statements claimed to be libelous."

INTRODUCTION

This is a case of intentional destruction of reputation. As a local public official, Appellant took a political stance strongly opposed by the city's only daily newspaper. During her re-election campaign, the newspaper printed defamatory falsehoods, ignored

requests for retractions, unfairly quoted libelous accusations of her opponent, and fashioned statements of opinion to maximize their defamatory impact. Because of California's retraction statute (CC48a), and recognition of First Amendment based absolute privileges for statements of opinion and for attributed libelous statements republished by newspapers, the newspaper never faced a jury. During trial the other defendants put the libelous newspaper articles into evidence and the jury decided that all of the libelous statements were true.

General Background. In 1977 The San Diego Union was San Diego's only morning daily newspaper. Together with its companion afternoon Copley Press paper, it provided San Diego's only metropolitan news coverage.

Petitioner was a public official seeking re-election to the governing board of California's second largest school district. The district had just experienced its first

major teachers' strike. Earlier in the year a new California law recognizing collective bargaining for teachers took effect, and the question of how tough or conciliatory the Board of Education should be in dealing with the teachers was a 'hot' issue in the community.

Appellant favored a conciliatory approach and was one of a 3 to 2 majority voting to grant amnesty for teachers who went out on strike.

The Superintendent, Board President and San Diego Union were among those who strongly supported taking a harder line. The Union editorialized:

> "..The support by three members of a no reprisal policy as the cost of getting teachers to obey the law, is bound to be an issue in the election this fall...That election is already shaping up as one that will be crucial to the direction of the San Diego school system in a period that is likely to be marked by increasing union militancy."
>
> "We have just seen a 3-2 majority ..pursue a policy that offers

little discouragement to strikes at all..... within a few months San Diego voters will have their first chance to register their reaction to the School Board's performance"

"In District C the issue is Julie Fisher who has been a solitary and disruptive force on the Board ...Her one-sided commitment to the teachers union was reflected in her amnesty vote and in some bizarre behavior during the school strike."

"In Mrs. Fisher (it is) a sympathy with teachers that clouds her judgment.."

About a month before the election the publisher warned of teacher militancy:

"No longer satisfied with one of the most feared and effective lobbying groups in Sacramento and Washington, militant teacher groups are now aiming at nothing less than control of local school boards by electing teacher advocates. This is an arrogant subversion of the public's interest, and unless checked, it will prove fatal to public education." "An adversary relationship between the Board and District employees is necessary and proper unless the taxpayers are willing to give teacher unions a signed blank check."

During the campaign the Union printed a series of defamatory news articles many of

which had oversized headlines and were featured in the position of greatest prominance within the newspaper. Those for which Appellant filed suit all appeared in the news columns. They were headlined:

> YVONNE LARSEN TO SEEK FISHER SEAT, Opposes Teacher Strike
>
> Called Disruptive Force on School Board, DISTRICT CHALLENGERS AGREE ON ONE THING: FISHER MUST GO
>
> In Board Races CITY TEACHERS SHOW POLITICAL STRENGTH
>
> JULIE FISHER CAMPAIGN CLAIMS DENIED BY OTHERS
>
> SCHOOL CANDIDATE LARSEN ACCUSES FISHER OF BLACKMAIL
>
> BOARD PRESIDENT RAPS FISHER ELECTION 'PLOY', Schools High Cost Disputed
>
> Fisher v. Larsen, FIERCE CLASHES PUNCTUATE DISTRICT C SCHOOL CAMPAIGN
>
> PUPIL PRIVACY LAW BROKEN BY FISHER, SCHOOL AIDE SAYS, Class Files of 81 Bared, States Stern
>
> BOARD EX-PRESIDENTS FAULT FISHER, 10 Issue Joint Statement Calling For Ouster Of Incumbent Trustee

When subjected to statistical analysis the Union's deviation from its own practices and

from accepted journalists' standards are shown to be so extreme that the only plausible conclusion is that they were deliberately constructed to defame Appellant out of the 'marketplace of ideas'.

That the Union violated accepted reporting standards is not disputed. After the election the readers' representative wrote a long column detailing some of the violations of reporting standards in the coverage of the Fisher-Larsen campaign. (B-86) It began,

> "Is it possible for a newspaper to be committed to fair and unbiased reporting and yet appear for a full week as though it were devoted to the defeat of a particular candidate?"

and concluded that these breaches were due to carelessness.

> "Ironically, a story on Page 1 of the same Sunday morning paper reported that the San Diego Union Poll showed Fisher with a substantial lead."
>
> "The statistics for that Poll had been gathered the previous weekend - before the blitz of negative stories during the campaign's final week. That the

> stories had an effect is certain: Fisher, shown leading in The Union Poll a week before the election, was defeated decisively last Tuesday."
>
> "Again, could all these bumbling non-actions and nonprofessional operations truly be just as I've concluded: Carelessness? Was there truly no concentrated campaign against Fisher, a candidate against whom The Union had editorialized?"
>
> "My answer is still - 'yes.'"

One need only examine the headlines to show that it would have been statistically impossible for The Union to 'carelessly' deviate so drastically from its own previous practice.

The three articles for which the demurrers were sustained, headlined JULIE FISHER CAMPAIGN CLAIMS DI'ED BY OTHERS, BOARD PRESIDENT RAPS FISHER ELECTION PLOY, and BOARD EX-PRESIDENTS FAULT FISHER, were each given a headline larger in size than any headline pertaining to any other candidate during the entire 1977 campaign. In relation to the sizes of headlines for articles covering other candidates, which appeared in 1977, the three Fisher headlines named above

were 3.5, 10 and 4.75 standard deviations above the mean respectively. In other words, the odds against the CAMPAIGN CLAIMS article being played with the same prominance just by chance were roughly 3000 to 1. As for the PLOY article, it would have been much more likely for Appellant to have been accidentally hit by lightning than to have been accidentally hit by a headline whose size deviated so greatly from the norm.

Appellant compiled a listing of all San Diego Union headlines covering municipal candidates (City Council, Board of Education and City College Board) during the last two weeks of each campaign from 1967 through 1977. Of the 200 headlines covering the 10 year period, only three of them named a candidate and were located in the upper right hand corner of page B-1, the front page of the local section. The three were BOARD PRESIDENT RAPS FISHER ELECTION PLOY, PUPIL PRIVACY LAW BROKEN BY FISHER SCHOOL AIDE

SAYS, and SCHOOL BOARD EX-PRESIDENTS FAULT FISHER.

Of the 200 headlines during the 10 year period, 15 conveyed a derogatory message about a particular candidate named in the headline itself. Those headlines and their locations in the paper are listed as follows:

MAYOR CALLS CLAIM BY MORROW FALSE (1973, B-3 bottom middle)

CANDIDATE AIMS REBUFF AT MAYOR (1973, B-3, bottom middle)

SCHOOL CANDIDATE LARSEN ACCUSES FISHER OF BLACKMAIL (1977, B-1, middle)

FISHER ACCUSED BY LARSEN OF 'OUTRIGHT BLACK-MAIL' (1977, B-4, middle)

SCHULTZE PROTESTS CLAIM BY STERLING (1977, B-3, bottom middle)

MITCHELL CRITICIZES JOHNSON STATEMENT OF QUALIFICATION (1977, top right)

OPPONENT ASSAILS FISHER AD ON TV (1977, B-4, middle left)

BOARD PRESIDENT RAPS FISHER ELECTION 'PLOY' (1977, B-1, top right)

FISHER CRITICIZED FOR ELECTION PLOY (1977, B-4 top right)

LOAN MADE TO MORROW QUESTIONED (1977, B-4 middle)

SCHULTZE TO STIRLING: RETURN DONATION (1977, B-3 bottom middle)

PUPIL PRIVACY LAW BROKEN BY FISHER, SCHOOL AIDE SAYS (1977, B-1 top right)

FISHER BROKE PRIVACY LAW AIDE SAYS (1977, B-4 top right)

EX-BOARD PRESIDENTS FAULT FISHER (1977, B-1 top right)

EX-BOARD LEADERS FAULT FISHER (1977, B-10, top left)

During the ten year period in which the 200 headlines appeared, there were 101 candidates. If 15 headlines were randomly (or carelessly) distributed among 101 candidates, the probability that 9 of the 15 would be 'carelessly' assigned to one candidate is 4.31×10^{-27}. It is likely to happen once in 23,196,541,652,000,000,000,000,000 tries. There were 17 candidates in the November 1977 San Diego municipal election. If one assumes that the 'carelessness' claimed by Copley Editors was limited to one year, 1977, then the probability of randomly assigning 9 out of 13 headlines to one of 17

candidates is 7.22×10^{-14} or likely to happen once in 13,852,556,690,000 tries, less than one time out of 13 trillion.

Comparison of the Union's adherence to other journalists' codes in the reporting of Fisher as compared to the reporting of other candidates gives equally compelling results.[1]

I. CIVIL CODE 48a IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT AND IT IS DESTRUCTIVE OF THE IMPLIED FIRST AMENDMENT RIGHT TO REPUTATION.

A 1950 challenge of Civil Code section 48a, based on the contention that it violated the Due Process and Equal Protection clauses of the Fourteenth Amendment was rejected by the California Supreme Court (Werner v. Southern Cal. Newspapers, 35 C.2d 121). The case was appealed to this Court, however the appeal was withdrawn. (340 U.S. 910)

In its first decision the Court of Appeal

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[1]The use of journalists' codes in libel actions is discussed in Libel as Malpractice, News Media Ethics and the Standard of Care, Fordham Law Review, vol. 53, pg. 449, 1984

ruled that Appellant could not recover special damages limited to loss of elective office and affirmed summary judgments for two causes of action because of failure to comply with CC48a. Appellant had complained to The Union but not in writing.

> "The fourth and fifth causes of action challenge similar allegations made in separate news articles, reasonably subject to interpretation as factual reports of Fisher's endorsement of illegal teachers' strikes. However, because Fisher never formally demanded retraction of these articles she only seeks to recover the 'special' damages limited to loss of the future benefits of her lost elective office. Since we hold these damages are not recoverable, summary judgments on the fourth and fifth causes of action were proper.-"(138 Cal.App.3d 643)

The second Court of Appeal decision includes a thorough discussion of the constitutionality of CC48a (A-23).

A. CIVIL CODE 48a NO LONGER SERVES A RATIONAL STATE PURPOSE.

> "The Equal Protection Clause allows the States considerable leeway to enact legislation that may appear to affect similarly situated people

> differently. Legislatures are ordinarily assumed to have acted constitutionally. Under traditional equal protection principles, distinctions need only be drawn in such a manner as to bear some rational relationship to a legitimate state end. Classifications are set aside only if they are based solely on reasons totally unrelated to the pursuit of the State's goals and only if no grounds can be conceived to justify them. We have departed from traditional equal protection principles only when the challenged statute places burdens upon "suspect classes" of persons or on a constitutional right that is deemed to be "fundamental"." (Clements v. Fashing, 457 U.S. 962, 963, 1982)

In 1950 the California Supreme Court concluded that Civil Code Section 48a did not violate the Due Process and Equal Protection clauses of the Fourteenth Amendment because at that time there was a rational relationship between the statute and the legislative purpose for which it was enacted.

> "There are at least two bases on which the legislature could reasonably conclude that the retraction provisions of section 48a provide a reasonable substitute for general damages in actions for defamation against newspapers..., namely, the danger of execessive recoveries of

general damages in libel actions and the public interest in the free dissemination of news." (Werner v. So. Calif. News., 35 C 2d 1950)

"..Although it extends its protection to those who may deliberately and maliciously disseminate libels, the Legislature could reasonably conclude that it was necessary to go so far to effectively protect those who in good faith and without malice inadvertently publish defamatory statements." (Werner v. South. Cal. Newspapers, 35 C.2d 134)

"In view of the complex and far-flung activities of the news services upon which newspapers and radio stations must largely rely and the necessity of publishing news while it is new, newspapers and radio stations may in good faith publicize items that are untrue but whose falsity they have neither the time nor the opportunity to ascertain. "(Werner, 128)

The Werner decision came fourteen years before New York Times v. Sullivan imposed the constitutional requirement that public person plaintiffs in libel actions prove that defendants acted with actual malice. The Times 'constitutional overlay' of state libel law makes 48a unnecessary for the

protection of 'honest conduct' and thus eliminates the Werner Court's stated reason for permitting the statute's protection of malicious conduct.

The decision in this case defends the protection of nothing but malicious conduct. It assumes that by giving absolute immunity to media defendants who have published with actual malice 48a serves a public interest.

> "The classification is also justified under the equal protection clause by the Legislature's purpose to encourage dissemination of the news. As we explained, because of the unique and essential role of media in our society, the Legislature could reasonably conclude the retraction statute is necessary to guarantee the continued free flow of news even when proof of malice is required for liability."(A-29)

> "With respect to the public interest in free dissemination of the news, even where liability is limited to cases where malice is proved, the threat of actions for defamation may still have a chilling effect on news gathering and dissemination." (A-27)

> "The retraction statute is a reasonable means of accomodating both the individual and public

interest." (A-27)"

This Court has rejected the same argument.

> "It is urged that the balance struck in New York Times should be modified to provide further protections for the press when sued for circulating erroneous information damaging to individual reputation.-.. In the 15 years since New York Times, the doctrine announced by that case, which was widely perceived as essentially protective of press freedoms, has been repeatedly affirmed as the appropriate First Amendment standard applicable in libel actions brought by public officials and public figures."
>
> "If the claimed inhibition flows from the fear of damages liability for publishing knowing or reckless falsehoods, those effects are precisely what New York Times and other cases have held to be consistent with the First Amendment. Spreading false information in and of itself carries no First Amendment credentials."
>
> "Those who publish defamatory falsehoods with the requisite culpability, are subject to liability, the aim being not only to compensate for injury but to deter publication of unprotected material threatening injury to individual reputation." Herbert v. Lando, 441 U.S. 170)

In a libel action with candidate plaintiff

and media defendant one cannot automatically assume that the media defendant was serving the information function and that it is therefore in the public interest to give that defendant maximum protection from liability. The First Amendment right of the public to receive information and ideas may weigh against the media defendant and for the plaintiff in such a suit.

> "It is the right of the viewers and listeners, not the right of the broadcasters which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market...It is the right of the public to receive other ideas and experiences which is crucial here."
> "The First Amendment interests of candidates and voters as well as broadcasters are implicated...we have recognized that it is of particular importance that candidates have the opportunity to make their views known so that the electorate may intelligently evaluate the candidates personal qualities and their positions on vital public issues before choosing among them on election day. The First Amendment has its fullest and most urgent

> application precisely to the conduct of campaigns for politcal office." (CBS v. Demo Nat'l Com. 412 U.S. 94)

The Court of Appeal also noted,

> "[I]n our analysis we must not lose sight of the fact that section 48a bars recovery of general damages only where the plaintiff fails to make a timely written request for retraction."

The requirement that public persons prove actual malice while private persons bear a lessor burden is largely based on recognition that public persons have access to the press. Normally a public official with a grievance about newspaper coverage will complain in person, which is just what Appellant did in this case (See D-2). The distinction between private and public persons made by this Court is based on the assumption that once the media is informed of its errors it will correct them. This does not hold where the newspaper's defamation is intentional.

The original justification of 48a has also

been weakened by the recognition of other privileges in addition to the actual malice requirement. At the time of Werner the privilege for statements of opinion was conditional, not absolute. In this case demurrers were sustained (Fisher v. Larsen, 645) and the statement 'she advocated the illegal use of funds' (Fisher v. Larsen 646, 647) was stricken because of the now recognized absolute privilege for statements of opinion. Also, when Werner was decided, the press did not have absolute immunity from liability for republished libels. Summary judgments for two causes of action were affirmed in this case because they were republications (Fisher v. Larsen, 642, 643). In addition, plaintiffs now have the burden of proving falsity when suing a media defendant (Philadelphia Newspapers v. Hepps, U.S. Supreme Court April 21, 1986).

Combining all of these, 48a now protects only those statements made with actual malice

and provably false and not statements of opinion, and not republications. Even without these extras, a statute that gives absolute immunity for publications made with knowlege of falsity or reckless disregard of the truth, and is otherwise superfluous serves no defensible state purpose.

B. 48a VIOLATES THE IMPLIED FIRST AMENDMENT RIGHT TO REPUTATION

The Appellate Court's 'bottom line' argument justifying 48a is that reputation is a state protected right that the state can take away.

> "A plaintiff has no vested property right in a particular measure of damages and the Legislature possesses broad authority to modify the scope and nature of such damages. It may create new rights or provide that rights which have previously existed shall no longer arise, and it has full power to regulate and circumscribe the methods and means of enjoying those rights, so long as there is no interference with constitutional guaranties." (A-24)

Because a fundamental right has been traditionally protected by the states does not mean that a state can take it away. Other

'threatened' rights have been incorporated under the protection of the First Amendment. This Court has recognized them as rights that are implied by but not stated in the First Amendment. These implied First Amendment rights are those presumed by the framers of the Constitution and necessary for the enjoyment of stated First Amendment rights.

> "The First Amendment is thus broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are, nonetheless necessary to the enjoyment of other First Amendment rights." (Globe Newspaper v. Superior Court, 81-611, 6-23-82)

> "The Constitution guarantees more than simply freedom from those abuses which led the Framers to single out particular rights. The very purpose of the First Amendment is to guarantee all facets of each right described; its draftsmen sought both to protect the rights of Englishmen and to enlarge their scope."
> "...certain unarticulated rights are implicit in enumerated guarantees. For example, the rights of association and of privacy...appear nowhere in the Constitution or Bill of Rights. Yet these important but unarticulated rights have nonetheless been found to share

> constitutional protection in common with explicit guarantees...fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined." (Richmond Newspapers vs. Virginia, 448 U.S. 578)

The 'right to reputation' meets the criteria required to be an implied First Amendment right. It was part of the common law presumed by the framers of the Constitution and it is indispenable to the enjoyment of rights explicitly defined.

The 18th century common law as compiled in Blackstone's Commentaries on the Law of England, recognized the right to reputation as an absolute right of personal security.

> "The right of persons, we may remember, were distributed into absolute and relative; absolute which were such as appertained and belonged to private men, considered merely as individuals, or single persons; and relative, which were incident to them as members of society, and connected to each other by various ties and relations. And the absolute rights of each individual were defined to be the right of personal security, the

right of personal liberty, and the right of private property."

"As to injuries which affect the personal security of individuals they are either injuries against their lives, their limbs, their bodies, their health, or their reputations." (Blackstone, Commentaries on the Law of England, Chapter 8, page 118)

According to Blackstone the right to adequate remedy for injury to reputation is acquired the instant the injury occurs.

"Now, since all wrong may be considered as merely a privation of right, the plain, natural remedy for every species of wrong is the being put in possession of that right, whereof the party injured is deprived. This may either be effected by a specific delivery or restoration of the subject-matter in dispute to the legal owner...or where that is not a possible, or at least not an adequate remedy, by making the suffered a pecuniary satisfaction in damages...to which damages the party injured has acquired an incomplete or inchoate right, the instant he receives the injury; though such right be not fully ascertained till they are assessed by the intervention of the law. The instruments whereby this remedy is obtained are a diversity of suits or actions, which are defined to be the 'lawful demand of one's right'." (Blackstone, Commentaries on the Law of England,

Chapter 8, page 114)

"The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being - a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system."

"An action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored."

"Moreover, the preventive effect of liability for defamation serves an important public purpose. For the rights and values of private personality far transcend mere personal interests. Surely if the 1950's taught us anything, they taught us that the poisonous atmosphere of the easy lie can infect and degrade a whole society." (Justice Stewart, concurring, Rosenblatt v. Baer, 383 U.S. 75, 92-94)

Since the constitutionally mandated actual malice requirement now protects the disseminator of news from excessive damages, there is

no longer a need for the retraction statute. The only function that section 48a now serves is to protect the deliberate lie or the statement made with reckless disregard of the truth.

By eliminating the deterring effect of having to answer for libels published with actual malice, 48a increases the likelihood that the public will be denied true reports and persons who take active roles in community affairs will needlessly suffer loss of reputation.

Because, in a public person libel action, Civil Code section 48a serves no positive purpose, and it is deprecative of constitutional rights, this Court should review its constitutionality.

II. THE FIRST AMENDMENT DOES NOT REQUIRE ABSOLUTE IMMUNITY FOR 'DISHONEST' STATEMENTS OF OPINION.

Although 'extra' protection, for statements of opinion and for republished libels has been recognized as part of the 'constitu-

tional overlay' imposed on state libel law by New York Times v Sullivan, the question of whether these privileges are absolute where the publications are deliberately constructed to defame a person out of the 'marketplace of ideas' has not been addressed.

It is clear that the constitutional privilege was intended to protect 'honest utterance', not calculated falsehood.

> "The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration. (Garrison v. Louisianna, 379 U.S. 75)

In this case, demurrers for three causes of action were sustained and the statement,

"She has advocated using monies to help minority causes even when she knows it would be illegal to use those monies for that particular cause" was stricken because they were determined to be statements of opinion.

> "The sixth cause of action alleges an article entitled JULIE FISHER CAMPAIGN CLAIMS DENIED BY OTHERS, published in the San Diego Union reasonably can be understood in the context of the article as calling her a liar. However, campaign claims are often vigorously denied.....The article contains no actionable defamation."
>
> "In her tenth cause of action Fisher attacks the San Diego Union article entitled BOARD PRESIDENT RAPS FISHER ELECTION PLOY...(The) statements are clearly opinion and the court properly determined they were not actionable. "The fifteenth cause of action concerned an article published just before election entitled SCHOOL BOARD EX-PRESIDENTS FAULT FISHER. Fisher admits 10 schoolboard ex-presidents supported her opponent, but claims the story was overplayed. The newspaper, AFTER ELECTION, editorially admitted it overemphasized the article and admitted failing to comply with general fair-reporting practices and its own reporting policy by not contacting Fisher for

> her response BEFORE publication. However, the article is factual, newsworthy in the context of the political campaign, and fully protected under the guarantees of the First Amendment.(See Miami Herald v. Tornillo ...)"(Fisher v. Larsen, 646)

The Court rejected petitioner's argument that the prominance of display of the contested articles, including headline size and location within the paper, and the fact that there was a series of articles should be considered when determining if the articles were defamatory. Defendants' contention that statements of opinion are not actionable regardless of their defamatory impact was accepted. That argument was based on the California Supreme Court's interpretation of a portion of the Gertz decision.

> "An essential element of libel..is that the publication in question must contain a false statement of fact. As expressed by the United States Supreme Court...Before the test of reckless or knowing falsity can be met, there must be a false statement of fact" ..This requirement...is constitutionally

based. The reason for the rule, well stated by the high court, is that 'Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." ..In this context courts apply the Constitution by carefully distinguishing between statements of opinion and fact, treating the one as constitutionally protected and imposing on the other civil liability for its abuse."(Gregory v. McDonnel Douglas Corp. 17 Cal. 3d 596)

The demurrers would not have been sustained under pre-Gertz California common law because it recognized only a qualified privilege for statements of opinion and petitioner had adequate evidence of malice to defeat the privilege.

"Statements of opinion, although of a defamatory nature, are privileged in California..."

"Defendants could legitimately comment upon and criticize.... even though the criticism adversely affected...reputation." "But this defense of fair comment is not absolute. There is no absolute right to destroy a person's name and reputation by publication of defamatory criticisms and opinions

> .... The protection which the law affords to those who would comment or criticize extends only to comment which is 'fair', not in the sense that it must be reasonable or moderate, but in the sense that it must be published, in part at least, for the bona fide purpose of giving the public the benefit of comment which it is entitled to have, rather than for any ulterior motive of causing harm to the plaintiff." "Allegations that the comments were not published primarily for a bona fide purpose, but were published because of malice, renders the publisher liable if his comments, opinions or criticisms are defamatory."(Maidman v. Jewish Publications 54 C.2d, 649,651,-652,653, 1960)

The argument that the Times decision and its progeny require the elimination of all defamation actions by public person plaintiffs if they are based on expressions of opinion, is not substantiated by those decisions.

A. The Times decision did not alter the conditional nature of the fair comment privilege.

In Times vs. Sullivan, this Court clarified the relationship between the constitutional privilege announced in that decision and

state privileges of fair comment.

Footnote 30 states that the fair comment privilege holds for comments based on facts believed to be true as well as for true facts.

> "Since the Fourteenth Amendment requires recognition of the conditional privilege for honest misstatements of fact, it follows that a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact. Both defenses are of course defeasible if the public official proves actual malice." (New York Times vs. Sullivan, 376 U.S. 292)

There is no indication that this Court intended to alter the conditional nature of the fair comment privilege. A careful reading of the decision can only lead one to conclude that this Court sought to put aside preoccupation with the fact/opinion distinctions and concentrate on the question of culpability.

B. The Gertz decision did not exempt dishonest opinions from libel actions.

The sentence from the Gertz decision, relied upon as authority for exempting opinions from libel actions, cannot reasonably be interpreted as making such a vast change in libel law.

> "The judge quoted a passage from Justice Powell's opinion for the Court in Gertz, which has become the opening salvo in all arguments for protection from defamation actions on the ground of opinion, even though the case did not remotely concern the question. "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.""Justice Powell's very next sentence however, was that 'there is no constitutional value in false statements of fact.' The alleged libels in Gertz which were deemed sufficiently 'factual' to support an action for defamation, included an implication that petitioner had 'a criminal record' and charges that he was a 'Leninist' or 'Communist fronter'. The sort of idea which can never be false was illustrated by reference to Thomas Jefferson's inaugural Address, where the President argued for freedom for

those who would wish to dissolve this Union or change its republican form."(Cianci vs. New Times 639 F.2d, 61, 62)

"While allegations referring to a person's motives may suffer from a certain indefiniteness, a defamation action may be brought in appropriate circumstances. A speaker is not accorded free speech protection for attacks on an individual's reputation interests by framing the attack as 'opinion'. Neither Gertz nor Bucher have eliminated all defamation actions based on allegations concerning matters of motive, integrity, and political characterization." (Burns vs. Mc.Graw-Hill, Colorado Supreme Court, 81 SC 121,2-22-83)

"The problem of defamatory opinion was not remotely an issue in Gertz and there is no evidence that the Court was speaking with an awareness of the rich and complex history of the struggle of the common law to deal with this problem. I am confident this court did not intend to wipe out this rich and complex history with the two sentences of dicta in Gertz quoted above." (U.S. Supreme Court 81-2407, Rehnquist and White dissenting)

It would be most beneficial if this Court would reaffirm that the constititutional privilege focuses on culpability and away from fact/opinion determinations; that

it altered the internal structure of libel law, placing honest misstatements, whether of fact of opinon, in one category, and defamations resulting from culpable conduct in the other, and that while the former is to be tolerated in the interest of public debate, the latter is not.

This Court should clarify that the opinions that are exempt from defamation actions form a subset of those statements that are not defamatory. Opinions that are defamatory, such as those in this case - that seriously injure reputation - remain conditionally privileged. To hold otherwise is to ignore culpability and the injury and concentrate on the weapon. This Court did not create an exemption from liability based on the 'weapon' used to inflict an injury. That would be like creating an exemption for murderers as long as they used some particular weapon to commit the murder.

The misconceptions surrounding the 'opinon'

issue are serious. They warrant review of this decision.

III. THERE IS NO CONSTITUTIOAL BASIS FOR EXEMPTING MEDIA DEFENDANTS FROM LIABILITY FOR UNFAIR REPUBLICATION OF LIBELS WITH ACTUAL MALICE.

In this case the Court of Appeal recognized a privilege which absolutely immunizes the press from liability for republication of libels, solely on federal grounds.

Three of the press publications for which petitioner filed suit were based on political news releases.

The Appellate Court reversed the summary judgments as they pertained to the publishers of the news releases, but affirmed the summary judgments for the newspaper that republished the same libels.

The portion of the Appellate Court's decision dealing with these articles does not contain any citations. However, in its discussion of the first article, the Court uses the terminology that is often included

in those jurisdictions that have adopted a constitutionally based 'neutral report' privilege.

> "The third cause of action accuses Copley Press and Scott-Blair, of defaming Fisher by reporting Yvonne Larsen's press conference, including her question, "Do the taxpayers like it when Julie Fisher appears at Union rallies and supports their demands?" Although the pleadings fault this report as unfair and false, the evidence shows it accurately reports an announcement of candidacy in one of the city's most newsworthy political races. It is clearly fair and neutral reportage of a news event allowing no inference the press was giving credence to the premise contained in Larsen's isolated question, nor undue emphasis upon that remark in context of the entire article. Absent an inference of malice, the trial court properly granted summary judgment on this cause of action." (Fisher v. Larsen, 642)

The Court went beyond the 'neutral report' privilege and recognized immunity for publication of attributed libels unfairly published with actual malice.

> "The seventh cause of action complains of the news story (commencing on the FRONT page of the San Diego Union's local section and

continuing on page 4) reporting Larsen's October 24th speech and press release under the heading "School Candidate Larsen Accuses Fisher of Blackmail." Fisher does not claim the article is literally inaccurate. (It merely quotes Larsen's general charges of blackmail and perjury which are the subject of the fifth and sixth causes of action without embellishment or editorial comment). However, she faults the press for unfairly distorting its coverage of the event at which the charges were made by displaying her political opponent's unproved charges of criminal conduct in the headlines, featuring the attack in the lead paragraphs and burying Fisher's rebuttal. One who reads only the headlines and lead paragraph would never know Fisher also appeared and spoke in the same forum. The San Diego Union admits this news coverage was unfair, as was its coverage of other stories highlighting accusations against Fisher, while omitting or minimizing defalcations of others. An editorial MEA CULPA published AFTER the election describes its coverage of the last week of Fisher's campaign as a 'blitz of negative stories,' characterized by 'bumbling non-actions and non-professional operations." However, no matter how unfairly the article was presented and how cursorily it is read, it is not false. Even the headlines and the lead paragraphs accurately attribute the public accusations to Larsen, a political candidate.

> Therefore, even though elements of actual malice potentially lurk in this scenario, there is no triable issue on whether the publication is false. Summary judgment was proper." (Fisher v. Larsen, 643)

According to common law, including that in California, a person is ordinarily subject to liability not only if he originates a defamation but also if he repeats a libel or slander originally published by another.

> "It may have been a true report of what these women told the reporter, but that is not the truth which will justify a publisher. If A says B is a thief, and C publishes the statement that A said B was a thief, in a certain sense this would be the truth, but not in the sense that the law means. It would constitute no defense to C, for it would be but a repetition by him of a slanderous charge." (Gilman v. McClatchy 111 Cal. 612, 1896)

The constitutional privilege announced in the Times decision does not distinguish between publisher and re-publisher; both are liable if they publish with actual malice.

The libelous statement in St. Amant vs.-

Thompson, 390 U.S. 727 was read verbatim by the defendant, who mistakenly believed he had no responsibility because he was merely quoting another. This Court considered that fact only as it related to the defendant's possible knowledge of falsity or reckless disregard as to the truth of the quoted statement.

> "St. Amant's mistake about his probable liability does not evidence a doubtful mind on his part."(St. Amant vs. Thompson, 390 U.S. 733)

The commnon law rule has been followed in post-Times decisions even in cases with media defendants.

> "The republication of false defamatory statements is as much a tort as the original publication." (Dixon v. Newsweek, U.S. Court of Appeals, Tenth Circuit, 1977, 562 F. 2d, 631)

A doctrine of neutral report, restricted to reports prepared in accordance with strict standards of fair reporting, has been adopted in some jurisdictions and rejected in others.

In 1977 the Second Circuit defined a

constitutional privilege protecting the press from liability for accurately reporting 'newsworthy' defamatory statements even when the reporter has serious doubts as to the truth of the statements. This is commonly called the Edward's 'neutral report' privilege. Some state courts have flatly rejected it.

> "In Edwards v. National Audobon Society, Inc. the Court of Appeals granted the press absolute immunity from liability for accurately reporting 'newsworthy' statements regardless of the press' belief about the truth of the statements. This doctrine has not been approved by the Supreme Court of the United States and has not received approval in other jurisdictions. We reject the doctrine." McCall v. Courier-Journal, Kentucky Supreme Court, 1981, 7 Media Law Rptr. 2121)
>
> The theory behind the rule of fair report is that the publisher acts as the agent of the public, reporting only that which others could hear for themselves were they to attend the proceedings. It has also been justified on policy grounds because the public has supervisory or oversight responsibilities over public bodies and officers. Normally the common law privilege does not extend to non-governmental

proceedings because the public has no oversight responsibility for their conduct."

"In Edwards v. National Audubon Society the court expanded this common-law rule of fair report..It immunized the publication of defamatory falsehoods even though they may be known to be such by the publisher by creating a special category of absolute privilege for attributed quotations. There was no agency or oversight justification for applying the common-law fair report privilege in Edwards..The privilege was extended and given constitutional status solely because the court perceived informational value to the public in the publication of the charges; they were newsworthy."

"Presumably, all publications of the news media are newsworthy. They are not privileged, however, unless the publisher is free of culpable conduct under the standards stated in New York Times." (Hogan v. Herald Co., N.Y. Supreme Court Appellate Div. Fourth Dept. Jan. 1982, 8 Med. L. Rptr. 1140)

This Court has been unequivocal in asserting that there is no First Amendment interest in protecting statements made with actual malice. The 'neutral report' privilege appears to be inconsistent with this Court's decisions. The expanded version of the 'neutral report'

privilege accepted by the Appellate Court in this case is even more at odds with this Court's decisions. It should be reviewed.

IV. THE PRINCIPLE ESTABLISHED BY NEW YORK TIMES VS. SULLIVAN MAY FAVOR THE PLAINTIFF IN A PUBLIC PERSON DEFAMATION SUIT. THE FEAR OF SANCTIONS IN THE FORM OF LIBEL AS WELL THE FEAR OF SANCTIONS IN THE FORM OF LIBEL SUITS WARRANTS FIRST AMENDMENT CONSIDERATION.

In the previous two sections the Court was asked to consider whether, the First Amendment requires abandonment of California common law in recognition of 'constitutionally based' absolute immunity for defamatory statements of opinion or republished libels. In this section the Court is asked to consider whether the First Amendment prohibits states from granting such absolute immunity because the resultant 'chilling' effect of the fear of libel on the would-be critic of government is comparable to that discussed in New York Times v. Sullivan.

The Times decision and its progeny set forth the general principle that state laws

governing civil libel litigation which discourage honest expression about public matters are inconsistent with the First Amendment.

Although the principle has been articulated in cases that illustrate the chilling effect of the fear of libel suits on expression, the same principle reasonably applies where it is the fear of libel which leads to a comparable self-censorship. It is the fear of speaking out that is addressed by the Times principle. Whether that fear is caused by envisioned libel suits or by envisioned libel is of little significance. Participation in the political process is reduced in either case.

Times gave 'critics of official conduct a fair equivalent of the immunity granted to the officials themselves.' The Court described the critic's privilege in terms of that previously recognized for officials.

> "Such a privilege for criticism of official conduct is appropriately analogous to the protection accorded

> a public official when he is sued for libel by a private citizen." ..."The reason for the official privilege is said to be that the threat of damage suits would otherwise inhibit the fearless, vigorous, and effective administration of policies of government and dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Analogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official's duty to administer." (Times)

The Court has recognized the importance of having public office holders who are not afraid to act.

> "Public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfuly perform the duties of their offices. Implicit in the idea that officials have some immunity for their acts, is a recognition that they may err. ... ..it is better to risk some error and possible injury from such error than not to decide or act at all" (Wood v. Strickland, 420 U.S. 319)

The testimony in this case shows that in the face of a school district crisis, the

teachers' strike, each of the board members took some initiative - some sort of 'action' to bring the strike to a close. Dorothea Edmiston described the chaotic efforts of board members to 'do something' to end the strike.(R.T. 1938 - 1940, 1963 - 1964). Without regard to the merits of their actions, these elected officials were making good-faith efforts to do their duty in an emergency. There were heated exchanges between them, but they were neither timid nor fearful, and the strike ended the next day. What would have happened if the board members had feared that their actions would later become the subject of libelous interpretations such as those for which Fisher filed suit?

The First Amendment right of the public to receive information and ideas may weigh against the defendant and for the plaintiff in a public person defamation suit

> "If it be conceded that the First Amendment was fashioned to assure the unfettered interchange of ideas

> for the bringing about of political and social changes desired by the people, then it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office. The political candidate does not lose the protection of the First Amendment when he declares himself for public office. Quite the contrary, the candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues."(Brown v. Hartlage, U.S. Supreme Court, April 1982)

In a libel action with candidate plaintiff and media defendant one cannot automatically assume that the media defendant was serving the information function and is therefore deserving of special First Amendment protection. Media influence over channels of communication may be, and usually is, used to invigorate the 'marketplace' of ideas. However that power may also be used to eliminate consideration of an idea through defamation of its advocate.

> "Local monopoly in printed news raises serious questions of diversity of information and opinion. What a

> local newspaper does not print about local affairs does not see general print at all. And, having the power to take initiative in reporting and enunciation of opinions, it has extraordinary power to set the atmosphere and determine the terms of local consideration of public issues.- (Miami Herald v. Tornillo, 418 U.S. 241, footnotes 15)

Inasmuch as any special First Amendment protection of the press is for the purpose of safeguarding the function of the press, where the media defendant failed to serve that function, the First Amendment interest in an informed public may weigh on the side of the public person plaintiff.

> "In a country like ours, where the people purport to be able to govern themselves through their elected representatives, adequate information about their government is of transcendent importance. That flow of intelligence deserves full First Amendment protection. Criticism and assessment of the performance of public officials and of government in general are not subject to penalties imposed by law. But these First Amendment values are not at all served by circulating false statements of fact about public officials. On the contrary, erroneous information frustrates

> these values. They are even more disserved when the statements falsely impugn the honesty of those men and women and hence lessen the confidence in government. As the Court said in Gertz, there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in uninhibited, robust, and wide-open debate on public issues."(Dun & Bradstreet v. Greenmoss Builders, Justice White, concurring)

V. THE CONSTITUTIONAL STANDARD OF REVIEW SHOULD APPLY TO THE QUESTION OF TRUTH IN PUBLIC PERSON DEFAMATION CASES WHERE THE DEFAMATORY CONTENT IS OF PUBLIC CONCERN.

Where, as in this case, determinations of truth involve matters of public concern and evidence of actual malice is intermingled with evidence of truth the constitutional standard of review should hold.

This Court recognized the constitutional privilege as a means of protecting the publics' interest in arriving at the truth,

> "Even where the utterance is false.....even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the

> ascertainment of truth." (Garrison v. Louisiana, 379 U.S. 64)
>
> "For speech concerning public affairs is more than self-expression; it is the essence of self-government." (Garrison v. Louisiana, 379 U.S. 64)

However, the actual malice rule has led to inclusion of evidence pertaining to what defendants believed that is easy to mix up with evidence of truth/falsity.

In This case, the jury's special verdict form (A-103) listed a series of questions for each cause of action. The initial question of each series asked if the statement was substantially true. This was followed by an instruction to skip all further questions if the answer was yes. During the trial the defamatory newpaper articles were put into evidence and the most injurious sections read to the jury. All of the initial questions were answered affirmatively. Appellant challenged the sufficiency of the evidence supporting the special verdict. The Appellate

Court did not use the constitutional standard of review when considering this question.

> "A challenge to the sufficiency of evidence requires that we do the following: "All conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary, but often overlooked principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court."(Crawford v. Southern Pacific Co. (1935) 3 Cal.2d 427, 429; emphasis supplied.)(A-30)

This Court recently addressed the problem of conflict between a rule similar to that cited by the Appellate Court and the constitutional standard of review announced in Times.

> "This is a case in which two well settled and respected rules of law point in opposite directions...Rule 52(a) provides: 'Findings of fact shall not be set aside unless clearly erroneous, and due regard

> shall be given to the opportunity of the trial court to judge on the credibility of the witnesses'
>
> "On the other hand....in cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.
>
> "The rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge."(Bose Corp. v. Consumers Union, U.S. Sup-.Ct., April 30, 1984)

In Bose this Court noted that the standard need only be applied to review of what is constitutionally required in a public person defamation case, proof of actual malice.

> "We reaffirm the principle of independent appellate review that we have applied uncounted times before. We hold that the clearly erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure does not prescribe the standard of review to be applied in reviewing a determination of actual malice in a case governed by New York Times v. Sullivan. Appellate

> judges in such a case must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity." Bose Corp. v. Consumers Union (April 30, 1984)
>
> "Indeed, it is not actually necessary to review the entire record to fulfill the function of independent appellate review on the actual malice question; rather, only those portions of the record which relate to the actual malice determination must be independently assessed."- (Bose, footnote 31)

This Court's recent Philadelphis v. Hepps 84-1491, April 21, 1986 decision recognized a constitutionally mandated change in burden of proof of truth/falsity in libel cases with media defendants. In this case the question of truth came up after the media defendant was exempted from liability and only non-media defendants were left. It's not clear whether Appellant should have had the burden of proof of truth. If Philadelphia v. Hepps requires that public official plaintiffs must now affirmatively prove falsity then the expanded constitutional requirement should imply an

expanded constitutional review.

Regardless of who bears the burden of proving truth or falsity, where evidence of actual malice is intermingled with evidence of truth about matters of public concern, independent review of both should be required as part of the special protection mandated by the First Amendment for speech on matters of public concern.

> "We have long recognized that not all speech is of equal First Amendment importance. It is speech on matters of public concern that is at the heart of the First Amendment's protection....this special concern for speech on public issues is no mystery. The First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. Speech concerning public affairs is more than self-expression; it is the essence of self-government. Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." (Dun & Bradstreet, Inc. v. Greenmoss Builders, June 26, 1985)

In a case such as this one, where the trier of fact is asked to make a determination of truth concerning matters of public concern, there is as much threat to underlying First Amendment principles when evidence of actual malice is weighed in determination of truth/-falsity as when evidence of truth/falsity is weighed in the determination of actual malice. The same First Amendment interests that would require the reviewing court to examine the evidence of actual malice if the jury had rendered a verdict favoring plaintiff - to 'assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people' - also requires examination of the facts pertaining to the truth of the statements. In Bose this Court reviewed both the truth/falsity and the actual malice evidence and found that the decision should be reversed mainly because the trier of fact weighed truth/falsity evidence on the actual malice 'scale'. In

this case the opposite occurred. Appendix C details the evidence of truth/falsity in this case.

The impact of the constitutional immunities recognized in this case on the jury's assessment of the truth should be considered. For example, the jury was asked to determine whether the statements contained in the Larsen 'blackmail' speech (B-97) were true, and the defendants put into evidence the newspaper article that unfairly republished the same libels. In reviewing the impact of the defamatory newspaper articles this Court should consider what is 'expected' from the press. Each of the 'charges' (See Appendix C) involved the kind of information one expects to see in a newspaper.

If the very same items that made up the 'accusations' had been published as news stories by a newspaper rather than by appellant and if the newspapers had exactly the same facts to back up the publications as appellant

produced during the trial, and the same general disclaimers were made, could any jury have ruled that the statements were false? In that situation, the press and public officials would be fulfilling their 'expected' roles. In this case the roles are distorted, with the press witholding information the public would expect to be reported. Even for statements that the Union didn't print, such as 'she passed on confidential information', what is expected from the press has a big impact on the jury's determination of truth. Jurors could not help but think, 'If what appellant said was true the newspaper would have reported it.'

Furthermore, the treatment of statements of opinion within the case is inconsistent. The factual content of the testimony accepted by the Court of Appeal as substantial evidence in support of the verdict is no greater than the factual content of statements ruled to be non-actionable statements of opinion. (See

Appendix C) The Court ruled,

> "With respect to attendance records, evidence showed that the matter had been investigated and nothing found wrong."(Page 29)

The 'evidence' consisted of general statements.

> "Dr. Patrick and his staff and the county superintendent and the district attorney Ed Miller's office all looked into it and said there was nothing wrong." Vol. VII, l. 20-22.
>
> Q. "And had that been previously investigated?"
>
> A. "By the county department. They found no wrongdoing." Vol XVIII p. 2041, l. 25-28.

On the other hand, the following,

> "She has advocated using monies to help minority causeseven when she knows it would be illegal to use those monies for that particular cause."

was determined to be a non-actionable statement of opinion.

All of defendants' evidence as to the truth of the statements that did not have two interpretations, was of the form 'our staff

investigated and found nothing wrong'. Appellant's evidence was specific and factual. If the Court had made an independent analysis of the facts, they would never have come to the conclusion that there was substantial evidence to support the libelous statements.

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

_____

Julie Fisher, Appellant
3726 Charles Street
San Diego, Calif., 92106
(619) 223-6623

October 25, 1986

COURT OF APPEAL

STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

April 24, 1986

APPEAL from a judgment of the Superior Court of San Diego County, Stevens Fargo, Judge. Affirmed.

INTRODUCTION

Julie Fisher filed this action for defamation in 1978 following her unsuccessful bid for re-election to the San Diego Board of Education. Defendants are Fisher's election opponent, Yvonne W. Larsen, her opponent's husband W. Daniel Larsen, campaign workers Joseph Harmon and Edwin Gray (collectively "Larsen"), The Copley Press, Inc., and its reporter Michael Scott-Blair (collectively "Copley"). Fisher appeals the judgment by the court in favor of Copley and the judgment on the jury's special verdict in favor of Larsen. Fisher contends the court erred in denying her motion for continuance rejecting

her peremptory challenge to the trial judge, trying the retraction issue first without a jury, and ruling the retraction statute is constitutional. Fisher also argues the special verdict is not supported by substantial evidence.

The action is based on statements made in a bitter election campaign with much of the campaign rhetoric focusing in Fisher's role in the 1977 teacher's strike. Trial took place nearly seven years after the School Board election. We affirm the judgment. We state the factual and procedural background separately on each issue.

DISCUSSION

I

RIGHT TO COUNSEL

A

Fisher claims the court's refusal to grant a continuance on two occasions within three months of trial was an abuse of discretion which deprived her of the right to

counsel. She argues she was ill-equipped to proceed as her own lawyer due to lack of knowledge of court procedure and rules of evidence citing specific incidents which prejudiced her during trial.

B

Fisher sought prelitigation advice from attorney Bob Shanner. She had been represented by attorney James H. Miller for two and one-half years. Fisher dismissed Miller and substituted herself in pro per on February 20, 1981, shortly after defendants filed their motions for summary judgment. The trial court denied Fisher's request to continue the motions. This court affirmed that ruling. (Fisher v. Larsen, (1982), 138 Cal. App. 3d 627, 648, cert. den., 464 U.S. 959)

On remand Fisher filed an at-issue memo stating she would "hire an attorney...and proceed to trial as rapidly as possible." The court set a trial date of December 5,

1983. Appearing in pro per at a November 8, 1983 status conference, Fisher requested a continuance of trial over the Copley's objections. Fisher signed a substitution of attorney four days before the December 1983 trial date. C. David Herring, Fisher's new lawyer, participated through his associate in selecting the new trial date of July 9, 1984. The court warned the parties that absent an extremely compelling reason, it would not continue the trial again.

On April 9, 1984, Fisher dismissed Herring and substituted herself once again without any prior arrangement for new counsel. Fisher hired Bruce Friedman on April 12, 1984. Friedman informed Fisher he had a schedule conflict with the July 9, 1984, trial date. He immediately moved to continue the trial, for change of venue, and to challenge the assigned judge. At the June 20, 1984 hearing on the continuance motion Friedman stated he was unavailable due to an Ontario

"five-year case that is going to go out;...We have beed assured that it will be assigned out. Because it's a five-year case, it has to be." Contrary to Mr. Friedman's representations, the Ontario case was filed on May 21, 1982, and was not affected by the five-year statute. Friedman rejected suggestions the Ontario case be trailed to accommodate the Fisher trial. He also stated he would be unavailable later in the summer due to vacation plans out of the country. At no time during the hearing on the motion for continuance did Mr. Friedman provide any other reason the Ontario case could not be trailed.

Stating Fisher's showing of good cause for continuance was "absolutely skinny," the court took the motion under submission. The court then contacted the judge in the Ontario case to confirm Mr. Friedman"s status and was assured that court would not be inconvenienced if Fisher v. Larsen commenced

on July 9 and the Ontario case trailed. Finding no real conflict in scheduling, the court denied the motion for continuance. Mr. Friedman withdrew from further representation of Fisher stating he would lose expert witnesses if forced to trail the Ontario case. Fisher's second motion for continuance to obtain trial counsel was denied on July 5, 1984. She commenced trial in pro per on July 9.

C

A trial court has wide discretion in granting or denying continuances and its decision will not be disturbed on appeal unless a clear abuse of discretion is shown. (Agnew v. Parks (1963) 219 Cal.App.2d 696, 700.) Continuances before or during trial in civil cases are generally disfavored and shall not be granted except on an affirmative showing of good cause under the standards recommended in section 9 of the Standards of Judicial Administration. (Cal. Rules of Court, rule

375(a); see also County of San Bernardino v. Doria Mining & Engineering Corp. (1977) 72 Cal.App.3d 776.) Section 9 provides in part:

> "...A continuance should be granted only upon an affirmative showing of good cause requiring the continuance. In general, the necessity for the continuance should have resulted from an emergency occurring after the trial setting conference that could not have been anticipated or avoided with reasonable diligence and cannot now be properly provided for other than by the granting of a continuance."

The parties to an action do not have the absolute right to insist upon a change of counsel at the last moment before commencement of trial where such change requires a continuance in order that the case may be properly prepared. (Flynn v. Fink (1923) 60 Cal.App.-670, 673.) Only in rare circumstances will change or withdrawal of counsel on the eve of trial justify granting of a continuance. (See Vann v. Shilleh (1975) 54 Cal.App.3d 192 (defendants did not know the attorney intended to withdraw from the case and had no time to

obtain a new attorney over the weekend.)

Fisher fails to demonstrate good cause for continuance of the trial date. Fisher, opposing counsel, and the court wanted Fisher to be represented by an attorney at trial. The court's only reason for considering Fisher's motion for continuance was that it was "appalled at the idea of having [Fisher] attempt to represent herself. I'm sure we're going to have great difficulty in putting on a case that makes sense to the jury." Nonetheless, Fisher voluntarily placed herself in the position of trying the case in pro per by discharging David Herring in April 1984 and substituting a new lawyer with a schedule conflict. Having previoulsy warned the parties that the trial would not likely be continued again, the court acted within its discretion in denying Fisher's motions.[1]

II

SECTION 170.6 CHALLENGE

In September 1978 the parties stipulated

to assignment of the case to Judge Stevens Fargo "for all matters including trial...." Counsel agreed the parties could reduce costs if the case were assigned to a single judge who would become familiar with the facts and applicable law. James H. Miller signed the stipulation on behalf of Fisher.

Pursuant to the stipulation, Judge Fargo presided over various hearings, including defendants' motions for summary judgment. After dismissal of Miller, Fisher herself participated in the November 1983 status conference. Fisher's new counsel, David Herring, cooperated in selecting a new trial date through an associate at the december 6, 1983, status conference. At no time did Fisher or Herring suggest the case should not go to trial before Judge Fargo as contemplated by the 1978 stipulation.

Attorney Friedman unsuccessfully moved to disqualify judge Fargo under code of Civil Procedure section 170.6. Judge William

T. Low denied the motion on grounds Fisher had waived the 170.6 challenge by stipulating in writing to the assignment of Judge Fargo. Fisher's petition for writ of mandate was denied by this court "on the basis the ruling is correct."

In general a matter adjudicated in a prior appeal will not be relitigated on subsequent appeal in the same case. (Davies v. Krasna (1975) 14 Cal.3d 502, 507.) For reasons of policy and convenience, an appellate court will not inquire into the merits of the first decision but will regard it as the law of the case. (United Dredging Co. v. Industrial Acc. Com. (1930) 208 Cal. 705, 712.) The doctrine of law of the case has been extended beyond appeals to decisions of an appellate court in original proceedings, including petitions for writ of mandate. (Guardianship of Walters (1947) 81 Cal.App.2d 684, 685; 9 Witkin, Cal. Procedure (3d ed. 1985), Appeal, 739, p. 708.)

This court has previously denied Fisher's petition for mandate holding Judge Low correctly ruled on the disqualification issue. Even though we may affirm solely on the basis our ruling is law of the case, we believe it will be helpful to the parties if we explain why we reached that decision.

Code of Civil Procedure section 170.6 provides in substance that any party to an action may make a motion, supported by an affidavit of prejudice, to disqualify the trial judge, commissioner, or referee. If the motion is timely and properly filed, the judge must recuse himself without further proof and the cause must be reassigned to another judge. (Solberg v. Superior Court (1977) 19 Cal.3d 182, 187.) The underlying purpose of section 170.6 is "to grant to the litigant a single reasonable opportunity to disqualify a known trial judge." (In re Jose S. (1978) 78 Cal.App.3d 619, 627.)

California courts have long recognized

that parties may waive disqualification for cause under Code of Civil Procedure section 170.1 and 170.3 by written stipulation or untimeliness. (Caminette v. Pacific Mutual Life Insurance Co. (1943) 22 Cal.2d 386, 390-391 (under former section 170).) The section 170.6 peremptory challenge may also be waived by agreement of the parties. (People v. Reynolds (1984) 154 Cal.App.3d 796, 807.) In Reynolds the defendant entered into a plea bargain under which it was agreed he would be sentenced by one of three superior court judges, the People preferring "Judge Kolostian, if available." (Id. at p. 806.) The defendant then attempted to disqualify the named judge under section 170.6. The court found all the promises of the plea bargain had been honored. By accepting the terms of the plea bargain which included the condition that defendant be sentenced by Judge Kolostian, defendant waived his right to challenge that judge under section 170.6.

(ID., at p. 807.) Here Fisher entered into a stipulation for over six years before bringing the peremptory challenge. Simply stated Fisher waived her right to challenge Judge Fargo.

Fisher's reliance on Zdonek v. Superior Court (1974) 38 Cal.App.3d 849, is misplaced. If anything Zdonek supports the trial court's ruling. In Zdonek the presiding judge of the master calendar department consolidated two civil actions and assigned them to Judge Jefferson for all further proceedings. After Judge Jefferson overruled a demurrer to the complaints and before a scheduled motion on class certification, Zdonek filed a motion to disqualify Judge Jefferson which was denied as untimely. On appeal the court addressed only the timeliness of the 170.6 challenge. Fisher argues the assignment of the consolidated case to Judge Jefferson "for all further proceedings" without objection by the parties was equivalent to a written

stipulation. There is no legal basis for Fisher's argument. Zdonek did not consider the issue of waiver by stipulation for the simple reason there was no stipulation. (Id., at p. 856.)

As noted earlier the lead opinion in Zdonek makes clear that an assignment of a case to a judge "for all further proceedings" does not preclude the timely filing of a Code of Civil Procedure section 170.6 affidavit. "All further proceedings" must be limited to those proceedings which the judge can lawfully hear. Since the statutory language of Code of Civil Procedure section 170.6 does not preclude a judge who has previously heard motions not involving contested factual issues from being disqualified, a party wishing to file a Code of Civil Procedure section 170.6 affidavit may successfully do so if done in a timely fashion.

Implicit in Zdonek is the strong message that appellate court should affirm the waiver

of the right to file a Code of Civil Procedure section 170.6 affidavit only where the parties expressly agree that the case has been assigned to a specific judge for all purposes -- exactly what occurred here. We have always assumed that when lawyers negotiate on which judge they will accept for "all purposes", signing a written agreement to that effect, each lawyer has bargained away his or her client's right to file a peremptory challenge disqualifying the judge selected. To conclude otherwise would only mean the entire negotiation and selection process of a single judge was wasted lawyer time with little or no meaning. Our assumption is also bases on our collective experiences as trial lawyers and judges wihch support our conclusion that when lawyers agree on specific language saying a judge shall "act for all pruposes including trial", the words mean what they say.

III

DENIAL OF JURY TRIAL ON SPECIAL DEFENSE

A

Fisher earlier appealed the adverse summary judgment. This court reversed as to some issues, including whether a November 3, 1977 San Diego Union article was defamatory in stating Fisher had "repeatedly said she would support the striking teachers and vote to grant them amnesty should circumstances similar to the June teaching strike arise again." (Fisher v. Larsen, supra, 138 Cal.App.3d at p. 644.) We also affirmed the trial court's ruling fisher was not entitled to special damages with regard to any of the causes of action in the lawsuit. (Id., at p. 636.)

Copley raised the special defense of Civil Code section 48a which provides a plaintiff shall recover no more than special damages unless plaintiff demands a retraction in writing "specifying the statements claimed

to be libelous" within twenty (20) days after knowledge of the alleged libelous statement. (Civ. Code, 48a.)[2] Fisher made two written demands for retraction of portions of the November 3, 1977 article. In a letter dated November 11, 1977, Fisher specified four statements she thought were false:

"It is not true that I am a demagogue and dishonest.

"It is not true that I am guilty of the crime of blackmail.

"I have not advocated the use of monies where it would be illegal to do so.

"It is not true that I lack ethics and integrity."

Fisher's attorney, James H. Miller, wrote a second letter on November 18, 1977, demanding correction of underlined portions of the November 3 article. Mr. Miller did not underline of circle the statement at issue here.

Fisher testified in her deposition she had made no request for retraction of the allegedly defamatory portion of the Union

article.[3] Fisher was subponaed to bring any written demand for retraction to the July 5, 1984 hearing on the motion for continuance of trial. At the hearing Fisher again admitted she did not believe she had ever demanded retraction of the statement. She did not feel the demand was timely because the statement had been printed in earlier articles. She only underlined statements that appeared for the first time in the November 3 article.[4] Copley immediately moved for judgment on the pleadings or, in the alternative, that the special defense be tried first on grounds a determination Fisher had failed to comply with section 48a's retraction requirements would bar Fisher from recovering any damages from Copley.

On the day of trial the court, on its own motion pursuant to Code of Civil Procedure section 598, ordered the issue of compliance with the Civil Code section 48a demand for retraction be heard in advance of the other

issues. The court then explained to Fisher:

> "It appears from what I've learned from reading the file and the papers here that the question whether you've complied with the provisions of 48(a) [sic] is a matter of law which I will have to determine without a jury. That may not be the case if I -- as I hear the matter, if there's a question of fact, you're entitled to a jury trial to decide the question of fact....I say that to you and assure you that I will be alert to determine any questions of fact -- I will not attempt to determine a question of fact on this issue or any other."

Fisher again admitted she had not made written demand for retraction of the statement she had "repeatedly said she would support the striking teachers," although she had made the demand for retraction orally. Fisher explained the reason she believed neither she nor Mr. Miller had underlined the statement at issue:

> "When I composed the letter for retraction that you had to ask for a retraction within twenty days of a publication of -- of the matter published, and that item had been published more than twenty days before. I had asked for a re-

> traction, an oral retraction, previously; but I didn't include it in my letter, and I'm not sure whether Mr. Miller underlined anything like that, because he underlined some other things that I didn't include in the letter, too. But I think that, you know, I'll go along with the assumption that he -- that he did not. If you want to --"

Based on Fisher's testimony the court concluded it was "absolutely undisputed that there's been a failure to comply with the provisions of 48(a) [sic] demanding retraction...." The court granted judgment in favor of Copley.

Fisher argues she was improperly denied a jury trial on the issue of her compliance with Civil Code section 48a. She asserts the court violated the 30-day notice provisions of Code of Civil Procedure section 598. Fisher also claims without authority the court was not entitled to rule on the section 48a issue where the facts on the issue were undisputed. She maintains once the jury trial was demanded only the jury could make findings of fact.

B

The trial court has wide discretion in regulating the order of proof at trial. (Silver v. Shemanske (1949) 89 Cal.App 2d 520, 530.) A change in the order of proof is particularly appropriate where the determination of a single issue, such as a special defense, may make further trial unnecessary. (Id., at pp. 530-531.) Code of Civil Procedure section 598 specifically authorizes the court, on its own motion at any time, to regulate the order of proof to promote "convenience of witnesses, the ends of justice, or the economy and efficiency of handling the litigation."

The right to trial by jury is a right to have the jury try and determine questions of fact. (Dorsey v. Barba (1952) 38 Cal.2d 350, 356 overruled on other grounds, Jehl v. Southern Pac. Co. (1967) 66 Cal.2d 821; 7 Witkin, Cal. Procedure (3d ed. 1985) Trial, 84, p. 85.) Even in jury cases, issues of law

are triable by the court. (See Code Civ. Prc., 591, 592; Evid. Code, 310, subd. (a).) Whether a plaintiff has met the requirements of Civil Code section 48a is a question of law. (Gomes v. Fried (1982) 136 Cal.App.3d 924, 936.)

In this case there was no question of fact to be determined by a jury. Fisher admitted she had not made written demand for retraction of the allegedly defamatory portion of the November 3, 1977 article because she believed the demand was untimely. Her testimony at the July 5 hearing and at trial belies any suggestion either the November 11 or November 18 letter was intednded as a request for retraction of the entire November 3 article. The court properly determined the retraction issue as a matter of law without a jury.

IV

CONSTITUTIONALITY OF SECTION 48a

A

Fisher next challenges the constitutionality of Civil Code section 48a. As a public figure she is required to prove Copley's allegedly defamatory statements were made with actual malice, that is, with knowledge of the falsity or with reckless disregard for the truth. (New York Times Co. v. Sullivan (1963) 376 U.S. 254, 279-280.) There is no liability for negligent or inadvertent falsehood published about a public figure after New York Times v. Sullivan. Fisher maintains this change in the law makes the additional protection afforded media defendants under Civil Code section 48a unnecessary. Moreover, the section 48a protections deprive Fisher of the rights enjoyed by plaintiffs defamed by persons other than media defendants. Fisher therefore maintains the classification created by the Legislature under

section 48a is an unconstitutional violation of due process and equal protection.

B

Werner v. Southern California Associated Newspapers (1950) 35 Cal.2d 121, app. dism., 340 U.S. 910, upheld the constitutionality of section 48a as a reasonable substitute for general damages in actions for defamation against newspapers and radio stations. Werner addresses both due process and equal protection issues in great detail. One of several stated bases for upholding the statute was that the Legislature could reasonably conclude the statute was necessary to effectively protect "those who in good faith and without malice inadvertently publish defamatory statements." (ID., at p. 134.) The issue presented here is whether the Werner decision is affected by New York Times v. Sullivan.

A plaintiff has no vested property right in a particular measure of damages and the

Legislature possesses broad authority to modify the scope and nature of such damages. (American Bank & Trust Co. v. Community Hospital (1984) 36 Cal.3d 359, 368.) "It may create new rights or provide that rights which have previously existed shall no longer arise, and it has full power to regulate and circumscribe the methods and means of enjoying those rights, so long as there is no interference with constitutional guarantees." (Werner v. Southern California Associated Newspapers, supra, 35 Cl.2d at p. 125.)

> "...[T]he constitutionality of measures affecting such economic rights under the due process clause does not depend on a judicial assessment of the justifications for the legislation or of the wisdom or fairness of the enactment. so long as the measure is rationally related to a legitimate state interest, policy determinations as to the need for, and desirablility of, the enactment are for the Legislature." (American Bank & Trust v. Community Hospital, supra, 36 Cal.3d at p. 369.)

The Werner court identified two bases on

which the Legislature could reasonably conclude section 48a could limit recovery for libel to special damages absent a demand for retraction and refusal: (1) the dangers of excessive recoveries of general damages in libel actions,[5] and (2) the public interest in free dissemination of the news. Each rationale remains valid after New York Times v. Sullivan.

The Legislature may attack the evils of unfounded litigation by abolishing causes of action altogether. (Werner v. Southern California Associated Newspapers, supra, 35 CAL.2D AT P. 126.) In Werner the court saw the problem of excessive recoveries demonstrated in two distinct situations: the danger of imposing liability when there had been no wrong committed and the danger of imposing excessive liability when no actual damages had been proved. (Id., at p. 127.) The Legislature could reasonably conclude the latter situation warrants the protections of section 48a.

With respect to the public interest in free dissemination of the news, even where liability is limited to cases where malice is proved, the threat of actions for defamation may still have a chilling effect on news gathering and dissemination.

> "In view of the complex and far-flung activities of the news servises upon which newspapers and radio stations must largely rely and the necessity of publishing news while it is new, newspapers and radio stations may in good faith publicize items that are untrue but whose falsity they have neither the time not the opportunity to ascertain. The Legislature may reasonably conclude that the public interest in the dissemination of news outweighs the possible injury to a plaintiff from the publication of a libel, and may properly encourage and protect news dissemination by relieving newspapers and radio stations from all but special damages resulting from defamation, upon the publication of a retraction. (Werner v. Southern California Associated Newspapers, supra, 38 Cal.2d at p. 128.)

The retraction statute is a reasonable means of accommodating both the individual and public interest.

Fisher asserts that section 48a creates

a classification under which media defendants receive greater protection from suit than non-media defendants. Such a classification is reasonable only if the difference between the classes is reasonably related to the puposes of the statute. (Werner v. Southern California Associated Newspapers, supra, 35 Cal. 2d at p. 131.)[6]

Once again, the Legislature could reasonably conclude defamation suits against newspapers and radio stations are the most conspicuous example of the evil of excessive recoveries since the media are the most frequent objects of defamation suits. (Werner v. Southern California Associated Newspapers, supra, 35 Cal.2d at pp. 132-133.) The classification may be justified on that basis alone. In addition, retraction is more effective if widely circulated by a newspaper or radio station than if circulated by an individual. (Ibid.) The role of retraction in mitigation of damages for defamtion serves the legisla-

ture's purpose of limiting excessive recoveries.

The classifiaction is also justified under the equal protection clause by the Legislature's purpose to encourage dissemination of the news. As we explained, because of the unique and essential role of media in our society, the Legislature could reasonably conclude the retraction statute is necessary to guarantee the continued free flow of news even when proof of malice is required for liability.

In our analysis we must not lose sight of the fact that section 48a bars recovery of general damages only where the plaintiff fails to make a timely written request for retraction. Retraction is a predicate which permits mitigation of damages without significant burden on the plaintiff. The statutory scheme encourages mitigation of damage to reputation where compensation for that damage is difficult if not impossible to accurately

measure.

V

SUBSTANTIAL EVIDENCE TO SUPPORT VERDICT

A

After the court granted judgment in favor of Copley on its section 48a special defense, trial proceeded before a jury to determine whether Fisher had been defamed by three Larsen campaign statements. Following a three-week trial, the jury returned a special verdict finding the statements were true.[7] Fisher contends the verdict is not supported by substantial evidence.

B

A challenge to the sufficiency of evidence requires that we do the following:

> "...[A]ll conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary, but often overlooked principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence,

> contradicted or uncontradicted, wheich will support the conclusion reached by the jury. When two or more inferences can be reasonable deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court."(Crawford v. Southern Pacific Co. (1935) 3 Cal 2d 427, 429; emphasis supplied.)

This appellate standard of review requires deference to the jurors' ability to review the evidence, assess credibility of witnesses, and resolve conflicts in evidence. After our careful review of this record, we conclude there was sufficient evidence to support the jury's special verdict.

C

July 27, 1977 Campaign Statement

Yvonne Larsen announced her School Board candidacy on July 27, 1977 and issued a press release prepared by W. Daniel Larsen and Joseph K. Harmon which included the rhetorical question : "Do taxpayers like it when Julie Fisher appears at union rallies and supports their demands?" (Special Verdict Issue #1.)

Fisher's quarrel with this statement is not the rhetorical inquiry on the taxpayers' state of mind, but its characterizing her as appearing at 'union rallies' and supporting the union's demands contrary to her duties as a school board member.

Photographs document Fisher's arrival at a teacher's rally at the Education Center. Witnesses confirmed her appearance at the rally, the teachers' warm response, and Fisher and the union president "clasping each other in greeting." Fisher addressed the teachers after the Board meeting where she accused Superintendent Thomas Goodman of wrongdoing. She also admitted she supported some of the teachers' demands. When the strike appeared imminent, Fisher worked with union leaders to formulate modified demands which she then urged Goodman and other School Board members to support. Fisher later assisted union leaders in working out an amnesty agreement which she signed. Board

member John Witt, Board president George Smith, school attorney Ben Echeverria, and superintendent Thomas Goodman all testified Fisher supported the teachers in the strike.

October 24, 1977 Campaign Statement

On October 24, 1977 Yvonne W. Larsen gave a campaign speech which had been prepared and reviewed by her, W. Daniel Larsen, and Edwin J. Gray. (Special Verdict Issue #15.) We consider the lengthy text in sections.

1. Fisher made scurrilous charges against Superintendent Goodman.

Fisher publicly charged superintendent Goodman with three violations of law or district policy: (1) submitting false attendance records; (2) misappropriating developers' funds; and (3) violating district personnel policies. Her argument here is that those charges were true.

With respect to attendance records, evidence showed the matter had been investigated and nothing found wrong.

The matter of assessment and use of developers' funds was also investigated by the school attorney and found to be without merit. Board member Dorothea Edmiston testified she was satisfied from the investigation that the charge of misappropriation was without merit. Board president George Smith agreed the charge was false. Fisher had submitted evidence of a memo from the school attorney stating the opinion that collection of developers' funds would not be legal if there was no need for school facilities at the school(s) that served the residents of the development.

Superintendent Goodman denied he had violated district personnel policy in two instances identified by Fisher. Edmiston and Smith agreed there had been no violation and the charges were false.

In effect in the underlying mini-trial the jury rejected Fisher's argument and found in favor of Goodman. Substantial evidence

supports this finding.

2. Fisher promised Goodman that if he would collaborate with the teacher's union, he would gain such a good reputation that he could name his job anywhere; the Larsen campaign speech characterized this promise as "almost a form of bribery."

Larsen's statement was based on a conversation between Fisher and Goodman the day before the teacher's strike. Only Fisher and Goodman were present.

Goodman testified Fisher came to his office and urged him to support the demands she had worked out with the union leaders. Fisher said if Goodman would go along with the demands, he would gain such a good reputation he could name his job anywhere; but if he refused she would charge him with wrongdoing. Fisher testified her statement about getting a job elsewhere was intended as a friendly overture. The jury accepted Goodman's account of the meeting.

3. Fisher told Goodman she would accuse him of many things and publicly call for his resignation if he refused to accept the teacher demands; the Larsen campaign speech characterized this threat as blackmail.

The blackmail statement was also based on the conversation between Fisher and Goodman the day before the teachers' strike.

Goodman testified Fisher threatened to publicly accuse him of wrongdoing unless he endorsed her list of demands from the teachers' union. He denied the charges and reminded Fisher they had all been previously investigated and proven false. Ben Echeverria, the school's attorney, testified Goodman reported Fisher's threats to him immediately following the confrontation. Echeverria advised Goodman to immediately write down what had happened. Goodman's notes were admitted into evidence. At the close of the next School Board meeting, Fisher read a statement accusing Goodman of wrongdoing and demanding

his resignation. Once again, the jury accepted Goodman's account of the meeting.[8]

4. Fisher was associated with the strike every step of the way.

Various witnesses testified about Fisher's involvement with the teachers' strike. Board member John Witt testified Fisher supported union views on some issues and some might feel her conduct gave impetus to the strike. Goodman testified Fisher participated in the strike and worked on the side of the teachers. Attorney Echeverria testified Fisher supported the teachers in the strike. Board president Smith stated Fisher was "100% on the side of the striking teachers." Other testimony described Fisher's actions during the strike. Fisher assisted union leaders in modifying their demands and sought support from the superintendent and the other Board members. Fisher was cheered by teachers and hugged by the union president during a rally. Fisher was observed loading picket signs into a

teacher's van after one of the rallies. Fisher later signed the union version of the amnesty agreement.

Fisher maintained she did not support the strike per se. Rather, she met with other school board members in efforts to avoid the strike. In spite of the contradictory evidence, on this record the jury could find the Larsen statement was true.

5. Fisher disclosed privileged information during the Carlin trial; Judge Welch called her a turncoat and a renegade.

During the school integration case, Carlin v. Board of Education, School Board attorneys contended Fisher had disclosed privileged information to the Carlin plaintiffs. The attorneys maintained the unauthorized disclosure of privileged information did not constitute a waiver of the privilege as to the entire Board. Judge Welch referred the matter to Judge Warner who ruled the information was privileged. Fisher argued the

report she disclosed was not marked confidential, was not from an attorney, but was a public report requested by the Board, and was therefore not privileged.

Fisher testified Judge Welch referred to her as a turncoat and a renegade.

The record supports the jury's conclusion the Larsen campaign statement was true.

November 4, 1977 Campaign Statement

On November 4, 1977, Yvonne W. Larsen issued a press release W. Daniel Larsen and Edwin J. Gray had helped prepare which included the following statement:

> "Julie Fisher's collaboration last spring with the striking teachers -- who defied the law and the judge's order -- was, in my opinion a direct violation of her oath of office to uphold the law." (Special Verdict Issue #29.)

Larsen argues Fisher "collaborated" with the striking teachers by negotiating with them on the amnesty issue outside appropriate channels. Fisher testified concerning her efforts along with John Witt to put together

an amnesty agreement and her signing the agreement. John Witt and Dorothea Edmiston said they declined to sign the agreement because they understood under the Brown Act such an agreement could only be signed in a public meeting.

Again, there is substantial evidence to support the jury's conclusion the November 4, 1977 campaign statement was true.

CONCLUSION

Before concluding this opinion a brief response is appropriate to Fisher's appellate counsel's free swinging general unjustified harsh criticism of Judge Stevens Fargo. We know that individual trial judges do not need written protection from appellate courts, but here plaintiff's appellate advocacy has gone too far. We have read, reread, and scrutinized the record and have concluded that the criticism of Judge Fargo who has patiently presided over these proceedings for several years is totally baseless. It is

only right that this personal word be expressed to compliment Judge Fargo who has done such a masterful job.

DISPOSITION

Judgment affirmed.

FOOTNOTES

1. In attempting to highlight the court's error in denying her request for a continuance Fisher argues she was actually prejediced as a result of representing herself at trial. Taking what we assume is literary license Fisher's appellate argument claims that without counsel her "case was doomed from the time it commenced." To support this contention she directs us to alleged incorrect evidentiary rulings, improper jury instructions and obfuscating special verdict forms. Although comfortable in making these assertions under the rubric of the court's failure to continue the case, we find it interesting that these arguments do not appear as separate contentions argued independently for reversal. If Fisher's appellate counsel believed these asserted errors actually prejudiced Fisher's trial we would assume each error would have been presented to us for review. Lacking any substantial argument on these contentions, we can only conclude they are meritless.

Nonetheless, we have reviewed the record with Fisher's specific claims in mind and conclude she was not prejudiced by being required to proceed to trial in pro per. This is not to say Fisher's task was an easy one; the record demonstrates her frustration with procedural and evidentiary matters,

particularly in the early stages of the trial. The record also demonstrates a consistent effort on the part of the trial court to insure Fisher was able to present her case to the jury. The court's instruction defining "reckless disregard for the truth: is supported by recent decisions of both the California Supreme Court and the United States Supreme Court. (See Bose Cor. v. Consumers Union of the U.S., Inc. (1984) U.S. , 104 S.Ct. 1949, 1965, fn. 30; St. Amant v. Thompson (1968) 390 U.S. 727, 731; Readers's Digest Assn v. Superior Court (1984) 37 Cal. 3d 244, 259 fn. 11.) The instruction that Fisher violated the Pupil Privacy Law was compelled by Fisher's insistence she had not broken the law after warnings from the court that the court of appeal had already ruled on the issue. Although the special verdict form was lengthy, the questions were presented in an organized way. There is nothing in the record to suggest the jury was in fact confused by the special verdict form.

2. Civil Code section 48a provides in part:

> "1. In any action for damages for the publication of a libel in a newspaper...plaintiff shall recover no more than special damages unless a corection be demanded and be not published...as hereinafter provided. Plaintiff shall serve upon the publisher, at the place of publication ...a written notice specifying the statements claimed to be libelous and demanding that the same be corrected. Said notice and demand must be served within 20 days after knowledge of the publication...of the statements claimed to be libelous."

3. Fisher's deposition included the following questions and responses:

> "Q. Did you demand the newspaper retract the statement of November 3,'77, in the San Diego Union, about you would support the striking teachers and vote to grant them amnesty, when you demanded the other retractions?
>
> "A. No. I think that was the same -- the same thing happened with that one. It was so close to what --
>
> "Q. Within the time limits.
>
> "A. --to what had been said earlier.
>
> "MR. MILLER: I don't know why you didn't do it.
>
> "BY MR IRWIN:
>
> "Q. It is the same article you demanded retraction about being called a demagogue. It is the identical article, and you didn't demand a retraction of that statement, did you?
>
> "A. I was under the impression that we were demanding retraction for the article, and that these are among other things, these are things that were false, defamatory statements in the article.
>
> "Q. All --
>
> "A. I didn't think you had to write down everything."

4. The following exchange took place at the hearing on Fisher's motion for continuance:

> "Q. And did you at any time underline in any of the November 3rd, 1977 article the sentence: 'Fisher has repeatedly said that she would support the striking teachers and vote to grant them amnesty'?
>
> "A. Frankly, I don't -- I don't believe so. I don't -- I'm not sure. I know that first -- the first request for retraction I went over it with -- it wasn't Mr. Miller. It was another -- another lawyer. An my understanding of the statute was that you have to ask for a retraction within 20 days. And I remember that. That statement is the one that they had printed before that -- and I hadn't asked for retraction before that. so all I just did was underline the statement that had first appeared at -- in this article."

5. The Legislature has recently voiced its concern with the limitation of excessive recoveries and the effect on medical malpractice premiums through passage of the comprehensive Medical Injury Compensation Reform Act of 1975 (MICRA). Various provisions of MICRA have survived constitutional challenge on both due process and equal protection grounds. (See Fein v. Permanente Medical Group (1985 38 Cal. 3d 137 (limitation of noneconomic damages to $250,000 and modification of collateral source rule); Roa v. Lodi Medical Group, Inc. (1985) 37 Cal. 3d 920 (limitation of attorney fees inmedical

malpractice actions); Barme v. Wood (1984) 37 Cal. 3d 174 (modification of collateral source rule); and American Bank & Trust Co. v. Community Hospital, supra, 36 Cal. 3d 359 (periodic payment of future damages of $50,000 or more).)

6. Contrary to Fisher's position, strict scrutiny is not required in our review of the constitutionality of the retraction statute. Equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissible interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class. (Massachusetts Board of REtirement v. Murgia (1976) 427 U.S. 307, 312.) Fundamental rights include rights of a uniquely private nature, the right to vote, the right of interstate travel, the rights guaranteed by the First Amendment, and the right to procreate. Suspect classes include alienage, race and ancestry. (Id. at p. 312, fn. 3, 4.)

7. The special verdict reads in part:

> "We, the jury in the above-entitled case, find the following Special Verdict on the issues submitted to us:
>
> "Issue No. 1: Was the following statement made by Yvonne Larsen, W. Daniel Larsen, and Joseph Harmon substantially true: "Do taxpayers like it when Julie Fisher appears at union rallies and supports their demands?"
>
> "Answer "yes" or "no".
>
> "Answer: Yes.

".....

"Issue No. 15: Was the following statement by Yvonne Larsen, W. Daniel Larsen and Edwin Gray substantially true:

"We watched her as she leveled a series of scurrilous charges against the superintendent of schools. This sorry chapter in the history of our schools was nothing less than blackmail.

"She told the superintendent that if he agreed to collaborate with the teachers union, she would see to it that he would gain such a good reputation that he could name his job anywhere in the country.

"But, if he refused, she would get him. She would accuse him of many things and publicly call for his resignation.

"The superintendent refused to go along with what was almost a form of bribery.

"Frankly, I hold no brief, either for or against the superintendent. He was fully able to defend himself against the false and vicious charges he was threatened with.

"But outright blackmail is not a quality I take too lightly.

"The strike -- by any standard -- was illegal. In my opinion, it also was immoral. And my opponent

was associated with it every step of the way.

"Her vote, coming as it did from one who earlier sought to blackmail the school superintendent, should not have been surprising.

"....she violated her public trust by passing on confidential, privileged information to the plaintiffs in the Carlin case. Superior Judge Welsh characterized her irresponsible actions as those of a 'turncoat' and a 'renegade.'

"Answer: Yes.

Issue No. 29: Was the following statement by Yvonne Larsen, W. Daniel Larsen, and Edwin Gray substantially true: "Julie Fisher's collaboration last spring with the striking teachers -- who defied the law and a judge's order -- was, in my opinion, a direct violation of her oath of office to uphold the law."

"Answer: Yes."

8. Fisher also argues the instruction defining blackmail was improper because it failed to include the word "secret", meaning something never previously disclosed. We find no error in the blackmail instruction given. (See Mullins v. Brando (1970) 13 Cal. App. 3d 409, 414-415; 4 Witkin, Summary of Cal. Law (8th ed. 1974), Torts, 287, p. 2258.)

COURT OF APPEAL

STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

December 24, 1982

138 Cal. App. 3d 627

Work, J. Following an aggressive election campaign, highlighted by intense media coverage, Julie Fisher lost her seat on the San Diego Unified School District Board of Education. Fisher blames her defeat on defamatory statements made by members of her successful challenger's camp, and libels published in local newspapers.

[138 Cal.App.3d 632]

In this defamation action, Fisher, acting as her own attorney, appeals summary judgments in favor of her successor, Yvonne Larsen, and certain Larsen campaign workers; summary judgments in favor of reporter Michael Scott-Blair and Copley Press Inc. (Copley); and orders sustaining demurrers to certain causes of action. Because there remain triable

issues of fact, we reverse one of the summary judgments for Copley and Scott-Blair, and each summary judgment favoring Yvonne Larsen and her campaign workers (except for designated parties). We affirm the order sustaining demurrers and reject other claims of error cited by Fisher. Finally, we hold the causes for Fisher's failure to prevail in the election are too uncertain to allow her to recover special damages reflecting the lost future and financial benefits of that position in a defamation action.

Factual Background

The contested 1977 election closely followed an illegal, widely-publicized, four-day teachers' strike by the San Diego Teachers' Association (Union) after which Fisher and other school board members granted amnesty to the strikers although the strike activities violated a court injunction. During the primary and general elections campaigns, Fisher and Larsen engaged in a series of

bitter claims and counterclaims extensively reported by the two local Copley Press, Inc. newspapers, (the San Diego Union, and the Tribune) and other local media outlets.

Fisher's suit charges the Larsen campaign defendants[1], San Diego Union reporter Scott--Blair and Copley with conspiring to defame her during the campaign. She cites various publications: some describing her actions during the teachers' strike in a manner which, in other contexts would have been innocuous but, given her official status and the apparent media and community hostility toward the illegal strike, proved to be politically improvident, and other publications explicitly accusing her of attempting to bribe and blackmail a public official, the superintendent of schools.

THE SUMMARY JUDGMENTS

When overruling demurrers to causes of action based upon these allegations in Fisher's first amended complaint, the trial court

determined the following separate public statements were reasonably subject to a defamatory per se interpretation:

1. Yvonne Larsen's press-conference question: "Do taxpayers like it when Fisher appears at Union rallies and supports their demands?" (susceptible to an interpretation Fisher, an elected school board official, approved and aided an illegal strike by the Teachers' Association)

[138 Cal.App.3d 633]

2. Contents of a San Diego Union article headlined "Support for Teacher's Union," containing the apparently factual assertion "She openly supported the teachers during their four-day strike in June" (a claim suggesting Fisher was guilty of breaching her official trust).

3. A San Diego Union article flatly stating "Fisher supported and marched with the striking treachers last June." (The inaccuracy of the assertion Fisher marched with the strikers

was admitted in a later San Diego Union editorial.)

4. Public charges by Yvonne Larsen accusing Fisher of:

(a) threatening to expose the school board superintendent to false charges of misconduct and illegal acts sufficient to cause him to lose his position unless he officially collaborated with the Teachers' Union, which Larsen characterized as "outright blackmail" and "nothing less than blackmail."

(b) being associated with the illegal teachers' strike "every step of the way;" and

(c) violating her official public trust by disclosing confidential, privileged information to the plaintiffs in a school integration case to which the school board was an adverse party[2].

5. Press reports of the Larsen "blackmail" charge in news coverage of the meeting during which the accusations were made.

6. Miscellaneous public comments by Yvonne

Larsen that Fisher "repeatedly said she would support striking teachers."

7. Yvonne Larsen's charges in a press release accusing Fisher of "(a) viclating school district policies and state and federal laws by infringing upon the students' right to privacy; and (b) violating her oath of office by collaborating in the illegal teachers strike.

8. The San Diego Union's slanted reporting of Larsen's privacy invasion remarks in an article headed "Pupil Privacy Law Broken by Fisher, School Aide Says." (Unobtrusively buried in the article is the aide's acknowledgement both Fisher and the school district had unintentionally violated the privacy laws.)

9. A news article suggesting Fisher had stated she would support illegally striking teachers under similar circumstances in the future.

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Each of these publications are discussed hereafter in the context of the causes of action to which it relates.

DISCUSSION

The holding of New York Times Co. v. Sullivan (1964) 376 U.S. 254 [11 L.Ed.2d 686, 84 S.Ct. 710, 95 A.L.R.2d 1412], bars a public figure, from recovering for defamation unless actual malice is shown by clear and convincing evidence. This requires showing the disseminator of the falsehood either knew it to be untrue or made the publication with reckless disregard for truth.

The summary judgments may be upheld only if the evidence, construed favorably to Fisher, raises no triable issues of fact. It is not suficient the moving declarations, standing alone, would support a defense judgment. The trial court may not weigh the credibility of declarants nor pass on the merits of the issues presented, and must construe movants' declarations strictly.

(Corwin v. Los Angeles Newspaper Service Bureau, Inc. (1971) 4 Cal.3d 842, 851-852 [94 CAl.Rptr. 785, 484 P.2d 953].)

Where allegedly libelous remarks can be understood by an average reader to be either an nonactionable expression of opinion or as a purported truthful statement of fact, the issue may not be resolved by summary judgment, but is one for the trier of fact. (Slaughter v. Friedman)(1982) 32 Cal. 3d. 149, 154 [185 Cal.Rptr. 244, 649 P.2d 886].) However, where media publications are couched in ambiguous terms, a finding of actual malice may not be found unless the jury is convinced "not only that the words were reasonably understood in their defamatory, factual sense, but also that the denfendant either deliberately cast his statements in an equivocal fashion in the hope of insinuating a defamatory impact to the reader, or that he knew or acted in reckless disregard of whether his words would be interpreted

by the average reader as defamatory statements of fact." (Good Government Group of Seal Beach, Ind. v. Superior Court)(1978) 232 Cal.3d.672, 684 [150 Cal.Rptr. 258, 586P.2d 572].) However, whether the publications are forthright or ambiguous, there must be some showing of potential actual malice to avoid summary judgment on that issue.(Id. at p. 685.)

Fisher, not a lawyer, claims the allegations of actual malice in her unverified complaint satisfies the required showing of actual malice. Fisher misconstrues her burden. While a demurrer tests the sufficiency of the pleadings and, in some instances, material allegations may be pleaded in the form of ultimate facts and in conclusionary language, summary judgment is designed to determine whether triable issues facially raised by the pleading are "real or merely the product of inept pleading." (Coyne v. Krempels (1950) 36 Cal.2d.257,262 [223 P.2d 244].)

Code of Civil Procedure section 437c requires a valid com-

[138 CAl.App.3d 635]

plaint be dismissed "unless the other party, by affidavit or affidavits, shall show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact." (Coyne v. Krempels, supra, at. p. 262.) Allegations of a pleading may not be considered by a trial court to support or to oppose a summary judgment. (Id., at pp. 262-263) Apparently, because she relied substantially upon conclusionary allegations of actual malice in each cause of action of her unverified complaint, Fisher filed only a short nonfactual declaration attached to her points and authorities and answers she made to Yvonne Larsen's interrogatories. Thus, our review is limited to the numerous depositions provided the trial court, Fisher's answers to interrogatories, and declarations in support of the

summary judgment[3].

"PARTIAL" SUMMARY JUDGMENTS[4]

Special Damages for Losses Flowing

From Fisher's Election Defeat

In each cause of action, Fisher's only claim for special damages is based upon the loss of her elective office and its attendant earnings (salary, dental benefits, trips and other benefits). Civil Code section 48a, subdivision 4(b), relating to news media, defines special damages as those suffered in respect to property, business, trade, profession or occupation and money spent as a result of the alleged libel and allows these to be recovered even where there is no demand for retraction.

The question of whether special damages limited to benefits and salaries, obtainable only by election to public office, are recoverable in a defamation[5] action appears to be one of first impression in this state although it has previously been considered

in other jurisdictions.

In (Southwestern Publishing Co. v. Horsey) (9th Cir. 1956) 230 F.2d 319, the court considered whether a defeated judicial officer could recover lost future financial perquisites of office in a defamation action. The court found them too uncertain and speculative because a thousand factors might influence an election,

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including the extent of newspaper coverage, political leanings of people moving into and out of an area, political party support, group endorsements, volunteer workers' efforts, personal campaigning by the candidates, events in which the candidates participated that might affect their popularity, political trends, and issues debated. The court concluded looking into the causes of election defeats was akin to opening Pandora's box.

A similar holding in Otero v. Ewing (La.-1926) 162 La. 453 [110 So. 648, 650, 56 A>L>R>

249], was delivered with the pithy comment: "It is common knowledge that there are many surprises at the result of elections by the people." (Accord, Fireld v. Colson (1981) 93 Ky. 347 [20 S.W. 264, 265]; Taylor v. Moseley (1916) 170 Ky. 592 [186 S.W. 634, 637]; Lynch v. Republic Pub. Co. (1952) 40 Wn.2d 379 [243 P.2d 636, 640]; Gough v. Tribune--Journal Company (1954) 75 Idaho 502 [275 P.2d 663, 668].)

The evidence shows Fisher's reelection was vigorously and publicly opposed by the ten outspoken former school board presidents, by the current school board president and the publisher and editorial staff of the two newspapers having by far the greatest circulation in the district encompassed by this election. In addition, Fisher's opponent was hand picked by the county central committee of a major political party in an effort to have her defeated. Aside from these factors, even a consideration limited

to Fisher's press coverage, preceding and during the campaign, reveals the impossibility of assessing the significance to her defeat of these few beats in the context of the year-long continuous drumroll of mostly negative publicity.

In this modern technological era with increasingly sophisticated polling techniques, we are reluctant to hold, as a matter of law, there may never be a case in which the evidentiary complexities cited in Southwestern may not be overcome. However, the evidence here does not show any possibility Fisher can establish she would have won reelection except for those statements we deeemed potentially libelous.

Since we find no triable issue of fact in the issue of entitlement to special damages related to loss of salaries and benefits of Fisher's elected office, we affirm partial summary judgments on that issue in each cause of action in favor of all defendants.

SUMMARY JUDGMENT: THE INDIVIDUAL CAUSES OF ACTION

I. Larsen Campaign Defendants

A. The charges of "blackmail" and other criminal conduct and breaches of trust sued on in the sixth cause of action were prepared by Edwin Gray,

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reviewed and adopted by W. Daniel Larsen and delivered by Yvonne Larsen during a public debate late in the campaign[7]. Gray described the speech as an effort to make Larsen's campaign more vigorous, and to this end he included charges of "blackmail" and innuendos of "bribery." The speech described Fisher's alleged misconduct and criminality in factual terms, although in his deposition Gray admitted previously knowing Fisher had denied the allegations when they were publicized months earlier in the press. He explains he simply chose to disbelieve so much of the news articles

as reported Fisher's denials and explanations, and to accept the hearsay statements attributed to Board President Smith who purportedly gave a hearsay version allegedly obtained from the superintendent. Although Gray's declaration in support of his motion for summary judgment is somewhat more self-serving and emphatic, the trial court may not disregard the inference of reckless disregard for truth implicit in Gray's deposition in view of his state motive to present a more vigorous (Dan Larsen said "hard biting") campaign.

These defendants downplay the significance of the blackmail and bribery charges, citing (Greenbelt Pub. Assn. v. Bresler (1910) 398 U.S. 6 [26 L.Ed.2d 6, 90 S.Ct. 1537]. This decision stresses the policy importance of insulating the news media from unwarranted attacks flowing from exercise of legitimate First Amendment rights. "The maintenance of the opportunity for free political discussion to the end that government may be

responsive to the will of the people and that changes may be obtained by lawful means...is a fundamental principle of our constitutional system." (Stromberg v. California (1931) 283 U.S. 359, 369 [75 L.Ed. 1117, 1123, 51 S.Ct. 532, 73 A.L.R. 1484].)

Greenbelt was charged with including libelous statements of others in its accurate report of a public meeting in which Bresler was accused by several persons of obtaining unfair leverage over the city while negotiating zoning variances permitting him to construct high density housing on land he owned. He was charged with "blackmailing" the city by blocking its efforts to acquire certain other land Bresler owned. The facts reported did not even hint at illegality. The press article correctly attributed the "blackmail" charge to members of the public at that meeting. The Supreme Court held it was simply impossible to believe a reader of the word "blackmail" in the reports "would

not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense." (Greenbelt Publishing Association v. Bresler supra, 398 U.S. 6, 14 [26 L.Ed.2d 6, 15].) The court found even the most careless reader would have

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relegated the term "blackmail" to mere rhetorical hyperbole, not an accusation of criminal activity.

However, Greenbelt's facts are far different than Larsen's purported statement of facts which, if true, describe criminal activities and label them as such. As is pointed out in the concurring opinion of Justice White, The Supreme Court "does not deny that the Constitution would permit recovery for charging

the crime of blackmail..."(Id. at pp. 21-22) Public statements purporting to be factual or which may be perceived by a jury to have been presented as factual, rather that opinioin, are actionable if they reasonably can be read in the context of the publication as charging a public official with a crime.- (See Good Government Group of Seal Beach, Inc. v. Superior Court, supra, 22 Cal.3d 672, 683; Gregory v. McDonnell Douglas Corp. (1976) 17 Cal.3d 596 [131 Cal.Rptr. 641, 552 P.2d 425].) Larsen's use of the word "blackmail" in the context of the entire statement reasonably may be interpreted as charging a crime. Further, the reporting of these specific charges, although accurate, is subject to an interpretation by the average reader that the Larsens have accused Fisher of felonious acts[8].

However, even where the words are reasonably understood in their defamatory factual sense, a defendant is entitled to summary judgment

unless the trial court determines there is a sufficient showing of actual malice to warrant submission of that issue to the jury. (Good Government Group of Seal Beach, Inc. v. Superior Court, supra, 22 Cal.3d at p. 685.)

Here, the question of actual malice turns on whether the Larsens knew the statements were false or made them in reckless disregard of whether they were false. In their defense, the Larsens state the actions which they describe as attempted bribery and blackmail purportedly were made in a face-to-face confrontation between Fisher and Superintendent Goodman at a meeting with no one else present. Before making the public statements, the Larsens read two news articles in the San Diego Union, reporting statements made by School Board President Smith in which he accused Fisher of asking Goodman to support a list of suggestions she presented to him in an effort to avert the then-pending

teachers' strike and support a Fisher espoused school desegregation plan. According to Smith, Fisher told Goodman she would call for his resignation if he did not follow her suggestions and, as a result, the teachers went on strike. The Larsens claim they acted reasonably in their belief in the truth of the statements, basing their belief on a chronological history kept by Superintendent Goodman and provided to them before preparing the speech. However,

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the Larsens knew of the past strained relations between Fisher and Goodman (they acknowledge awareness of Fisher's charges made earlier against Goodman which resulted in litigation and law enforcement investigation) and they reviewed the chronology knowing it was prepared by one of only two parties at the meeting in which the bribe was purportedly offered and the blackmail threats allegedly made[9].

The Larsens made no effort to check the truthfulness of the chronology as prepared by Superintendent Goodman by contacting either Fisher or Goodman.[10]

Yvonne Larsen, in her declaration in support of summary judgment states: "While declarant is conscious of the bitter attacks upon the school superintendent by [Fisher], declarant had no reason whatsoever to question the veracity or integrituy of the superintendent's report of the meeting with [Fisher], or the reports in the newspapers,...or the statements of the president of the Board of Education in regard to same."

We cannot tell from the court's order of summary judgment whether it believed there was no triable issue of fact in defendants' defense of truth (that the bribery and blackmail were actually attempted) or whether it simply determined there weas no actual malice in the publication. If the former, then the order is erroneous because Fisher's

deposition contains repeated and emphatic denials any such threats or promises were made during her face-to-face confrontation with Goodman.

Nor can the order be upheld on the ground there is no triable issue of fact as to whether the accusations of criminal conduct were made with actual malice. Because a trier of fact could resolve the credibility contest over the dispute as to what actually transpired at the Goodman-Fisher confrontation in Fisher's favor, the question is whether the trier of fact could find Larsens' acceptance of

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Smith's hearsay version without investigation showed a reckless deisregard of whether it was false. On this record, we cannot say a jury could not find actual malice. Although well able to do so, the Larsens took no steps to confirm the accuracy of the contents of Goodman's memo by contacting

either Fisher or Goodman. And although mere negligence in investigating alone does not establish actual malice, evidence of the complete lack of investigation to determine the truth of the charges, of the Larsens' motive and intent in making the accusations, and their complete disregard of Fisher's denials may, by accumulation and by appropriate inferences, show recklessness.

"The mere profession of a defendant that he believed in good faith that his statements were true do not automatically entitle him to a verdict in his favor." (Widener v. Pacific Gas & Electric Co. (1977) 75 Cal.App.3d 415, 435 [142 CAl.Rptr. 304], citing St. Amant v. Thompson (1968) 390 U.S. 727, 732-733 [20 L. Ed.2d 262, 267-268, 88 S.Ct. 1323].) The court in Goldwater v. Ginzburg (2d Cir. 1969) 414 F.2d 324, 343, states: "recklessness is, after all, only negligence raised to a higher power." Further "actual malice" may be inferred when the investigation

was grossly inadequate under the circumstances. (Vandenburg v. Newsweek, Inc. (5th Cir. 1975) 507 F.2d 1024, 1026.)

There are no First Amendment protections for accusations of criminal conduct or personal dishonesty. (Gregory v. McDonnell Douglas Corp. supra, 17 Cal. 3d 596, 604.) Where the information is from a source known to be hostile to the subject against whom the material is to be used, failure to investigate the truth of allegations solely received from this source may support a finding the publication has been made in wanton and reckless disregard of veracity. (Curtis Publishing Co. v. Butts (1967) 388 U.S. 130, 156-157 [18 L.Ed.2d 1094, 1111-1112, 87 S.Ct. 1975].) Where a public official is involved, whether failure to investigate criminal charges documented only by information from a source known to be biased against the person accused are made shows reckless disregard of the truth, is a matter to be

decided by the trier of fact. Except as to Harmon, the summary judgment as to the sixth cause of action are reversed.

B. The first and second causes of action charge Yvonne Larsen, her campaign workers, W. Daniel Larsen (her husband), Joseph Harmon and Edwin Gray[11] with preparing and disseminating oral and written defamation consisting of innuendos falsely accusing Fisher of appearing at Union rallies and supporting Union demands at a time when these remarks were likely to be perceived as charging her with collaborating in an illegal strike designed to unlawfully coerce the Board of Education of which Fisher herself was a member. If proved, this is defamatory per se.

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Fisher's evidence shows she has always publicly stated she opposed all teachers' strikes, including the one in June 1977. Further, Harmon and W. Daniel Larsen each admits he was aware Fisher denied supporting

the illegal strike before they prepared and presented the July 27th speech.

Harmon cannot recall upon what he relied in preparing the first press release about the speech. W. Daniel Larsen stated he held no opinion on whether Fisher favored the strikers going out on strike, only an impression she "was on the teachers' side." The complete lack of concern for the truthfullness of the innuendos of Fisher's collaboration with the illegal strikers is illustrated by this excerpt from W. Daniel Larsen's deposition:

"Q. Was the truth or falsity of that statement that Mrs. Fisher had supported the teachers going out on strike ever discussed in campaign meetings?"

"A. No, I think it was just an assumed fact that nobody questioned.

"Q. Did you become aware at some point in time that Mrs. Fisher was making statements to the effect that she had strongly opposed

the teachers going out on strike?

"A. Yes, but that didn't change our opinion.

"Q. Did the committee do anything to attempt to determine whether or not Mrs. Fisher was, in fact, correct when she said she had opposed the teacher's strike?

"A. No.

"Q. Was there anyone on the committee who was assigned to do research into the truth or falsity of statements that were made in the course of the Larsen campaign?

"A. No, I don't believe so.

".....

"Q. Well, was there ever any member of the committee who said, well, maybe we ought to check it out or talk to someone who was present at that time, or anything of that sort?

"A. Everybody was under the opinion that Mrs. Fisher supported the teachers and the actions that they took, including the strike."

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Here, there are triable issues of fact on the issues of falsity and actual malice. Except as to Edwin Gray, we reverse the summary judgments on these causes of action.

C. The ninth cause of action faults Larsen and her campaign workers for accusing Fisher of (1) violating student privacy laws and (2) collaborating with (illegally) striking teachers in violation of her oath of office.

That Fisher (as well as the rest of the school administration) violated the privacy laws is undisputed. This statement is not false, and is well within the protected speech of a political campaign.

However, if false, the outright assertion Fisher had collaborated with teachers illegally striking against the board of education of which she was a member is defamatory per se. Although the characterization of her conduct as "unethical and unlawful" is couched in opinion form, the charge of "collaboration" is not. The statement is

subject to a reasonable interpretation Fisher actively participated with and assisted the teachers in violating the law.

Although Larsen says she relied on media accounts, including the false report in Scott-Blair's article detailing Fisher's march with the striking teachers (see discussion, post), she ignores Fisher's published, repeated denials of support for teachers' strikes and the editorial apology for the Scott-Blair misstatements.

Because there is a triable issue of fact as to actual malice, we reverse the summary judgments on the ninth cause of action, except as to Harmon.

II. Copley Press and Scott-Blair

A. The third cause of action accuses Copley Press and Scott-Blair, of defaming Fisher by reporting Yvonne Larsen's press conference, including her question, "Do the taxpayers like it when Julie Fisher appears at Union rallies and supports their demands?" Although

the pleadings fault this report as unfair and false, the evidence shows it accurately reports an announcement of candidacy in one of the city's most newsworthuy political races. It is clearly fair and neutral reportage of a news event allowing no inference the press was giving credence to the premise contained in Larsen's isolated question, nor undue emphasis upon that remark in context of the entire article. Absent an inference of malice, the trial court properly granted summary judgment on this cause of action.

B. The seventh cause of action complains of the news story (commencing on the front page of the San Diego Union's local section and continuing on page 4)

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reporting Larsen's October 24th speech and press release under the heading "School Candidate Larsen Accuses Fisher of Blackmail." Fisher does not claim the article is literally inaccurate. (It merely quotes Larsen's

general charges of blackmail and perjury which are the subject of the fifth and sixth causes of action, without embellishment or editorial comment.[12]) However, she faults the press for unfairly distorting its coverage of the event at which the charges were made by displaying her political opponent's unproved charges of criminal conduct in the headlines, featuring the attack in the lead paragraphs and burying Fisher's rebuttal. One who reads only the headlines and lead paragraph would never know Fisher also appeared and spoke in the same forum. The San Diego Union admits this news coverage was unfair, as was its coverage of other stories highlighting accusations against Fisher, while omitting or minimizing defalcations of others. An editorial mea culpa published after the election describes its coverage of the last week of Fisher's campaign as a "blitz of negative stories," characterized by "bumbling non-actions and non-professional

operations."

However, no matter how unfairly the article was presented and how cursorily it is read, it is not false. Even the headlines and lead paragraphs accurately attribute the public accusations to Larsen, a political candidate.[13] Therefore, even though elements of actual malice potentially lurk in this scenario, there is no triable issue on whether the publication is false. Summary judgment was proper.

C. The fourth and fifth causes of action challenge similar allegations made in separate news articles, reasonably subject to interpretation as factual reports of Fisher's endorsement of illegal teachers' strikes. However, because Fisher never formally demanded retraction of these articles, she only seeks to recover the "special" damages limited to loss of the future income and benefits of her lost elective office.[14] Since we hold these damages are not recoverable,

summary judgments on the fourth and fifth causes of action were proper.

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D. In her eighth cause of action, Fisher cites the San Diego Union November 3, 1977, article written by Scott-Blair which bluntly states she had "repeatedly said she would support the striking teachers and vote to grant them amnesty should circumstances similar to the June teaching strike arise again." Although the article emphatically states Fisher made repeated statements to this effect, there is no evidence she did so.

The press disregarded a formal demand for retraction. Instead of relying on truth as a defense, the press contends the statement, within the scope of the entire article, and in the context of a political campaign, is not defamatory as a matter of law, citing Desert Sun Publishing Co. v. Superior Court, supra, at pages 51 and 53. However, a

newspaper article purporting to be accurate, objective reporting or political analysis, stands separately from partisan political publications produced by openly avowed advocates such as those discussed in Desert Sun, supra.

Contrary to these claims, the statement cannot be construed as only a statement of opinion regarding Fisher's future conduct; it purports to be a factual report of Fisher's declared intent to support illegally striking teachers in the future.

Scott-Blair states he was unaware of the falsity of this statement when he prepared the article. However, he continuously followed Fisher's campaign from before the June 1977 strike, and knew he earlier falsely reported Fisher had actually marched with the teachers during their illegal strike and knew Fisher publicly denied favoring teacher's strikes.- (See San Diego Union editorial, 10/17/77, "Uplavici Syndrome Strikes Again...")

Because there are triable issues of fact here, we reverse the summary judgment on the eighth cause of action.

E. For the same reasons we uphold the summary judgment on the seventh cause of action, we approve the one awarded to the press on the tenth cause of action stemming from the November 4, 1977, news coverage of a press conference in which Larsen accused Fisher of breaking school privacy laws. The article augmented Larsen's comments with similar accusations from the school board's attorney. Although the unfairness of its mode of presentation was belatedly editorially admitted by the San Diego Union, its contents are factual.

III. All Defendants

F. Fisher raises no triable issue of fact on the question of whether all or any of the defendants conspired to defame her. Summary judgment was proper on the eleventh cause of action.

[138 Cal.App.3d 645]

THE DEMURRERS WERE PROPERLY SUSTAINED[15]

Even though Fisher's notices of appeal do not specify she is appealing the rulings on demurrers, each party has fully briefed the propriety of the trial court's rulings sustaining demurrers to the sixth, ninth, tenth, fifteenth and seventeenth causes of action in the first amended complaint with leave to amend. In response, Fisher filed a second amended complaint in which the causes of action to which demurrers were overuled were restated by eliminating language which the court ordered stricken as surplusage. In spite of the opportunity to amend the sixth, ninth, tenth, fifteenth and seventeenth causes of action, she did not do so, chosing instead to omit them entirely.[16]

On appeal, an order sustaining a demurrer will be upheld if the complaint or portion of the complaint fails to state a cause

of action. (Code Civ. Proc. 430.10, subd.(e).)

The sixth cause of action alleges an article entitled JULIE FISHER CAMPAIGN CLAIMS DENIED BY OTHERS, published in the San Diego Union reasonably can be understood in the context of the article as calling her a liar. However, campaign claims are often vigorously denied. As stated in Scott v. McDonnell Douglas Corp. (1974) 37 CAl.App.3d 277, 291 [112 Cal.Rptr. 609]: "The fact that plaintiff takes umbrage at the tone and level of criticism directed against him is not sufficient to sustain an action for defamation. The statements in the instant controversy should be considered in the light of the usual political hyperbole customarily encountered when political figures clash on controversial public matters."

The article contains no actionable defamation.

The ninth cause of action alleged the Larsen campaign defendants defamed Fisher

by criticizing her campaign advertising claim that windowless schools are costing taxpayers $100 million extra.

Viewed against the background of a heated political election, the trial court properly concluded Larsen's comments unambiguously expressed only her opinion and as a matter of law were entitled to First Amendment protection.

In her tenth cause of action Fisher attacks the San Diego Union article entitled BOARD PRESIDENT RAPS FISHER ELECTION PLOY and subheaded "Schools' High

[138 Cal.App.3d 646]

Cost Disputed." Smith's reputed statements are clearly opinion and the court properly determined they were not actionable. (Okun v. Superior Court (1981) 29 Cal.3d 442 [175 Cal.Rptr. 157, 629 P.2d 1369].)

The Fifteenth cause of action concerned an article published just before election entitled SCHOOL BOARD EX-PRESIDENTS FAULT

FISHER. Fisher admits 10 school board ex-presidents supported her opponent, but claims the story was overplayed. The newspaper, after election, editorially admitted it overemphasized the article and admitted failing to comply with general fair-reporting practices and its own reporting policy by not contacting Fisher for her response before publication. However, the article is factual, newsworthy in the context of the political campaign, and fully protected under the guarantees of the First Amendment. (See Miami Herald Publishing Co. v. Tornillo (1974) 418 U.S. 241, 258 [41 L.Ed.2d 730, 741, 94S.CT. 2831].)

The court also properly sustained the demurrer to Fisher's seventeenth cause of action charging the press defendants with negligent reporting. There is no cause of action for ordinary negligence by a public official against a newspaper. (New York Times Cor. v. Sulluvan, supra, 376 U.S. 254;

Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323 [41 L.Ed.2d 789, 94 S.Ct. 2997].) The official must prove "actual malice" by showing either the statement was made (1) with actual knowledge it was false, or (2) with reckless disregard of whether it was false.

Fisher contends the correct rule is (or should be) that defamation flowing from ordinary negligence alone is actionable. She claims it is only the recovery of monetary damages which the foregoing cases will not allow on a showing of mere negligence. For this proposition, she posits a cause of action allowing a public official to sue for negligent defamation so long as the prayer is limited to a demand for a forced retraction. While there may be statutes authorizing such actions (see conc. opinion, Brennan, J., in Miami Herald Publishing col v. Tornillo, supra, 418 U.S. 241, 258 [41 L.Ed.2d 730, 741]), Fisher has not pleaded under one, and she only asks for monetary

relief. We are bound by the New York Times v. Sullivan, supra, standard. (Good Government of Seal Beach, Inc. v. Superior Court, supra, 22 Cal.3d 672, 680.)

THE TRIAL COURT PROPERLY STRUCK IMMATERIAL ALLEGATIONS FROM THE ORIGINAL COMPLAINT

Fisher claims the trial court improperly struck portions of certain alleged publications from her pleadings. However, two of the cited publications were never included in any causes of action and thus were never stricken, and

[138 Cal.App.3d 647]

the trial court was within its discretion in deleting non-defamatory statements from others to exclude immaterial evidentiary matters from the complaint.[17]

Fisher relies on dicta from Forsher v. Bugliosi (1980) 26 Cal.3d. 792 [163 Cal.Rptr. 628, 608 P.2d 716], for the premise the determination of whether a publication is defamatory depends on the publication taken as a whole,

not extracted statements. We do not quarrel with her proposition, only her suggested application. Here, the causes of action affected by the motion to strike both withstood demurrer. Fisher was not precluded from pursuing her defamation action based on the total publications. Instead, the summary judgment motion as to these publications proceeded on alternate theories the statements were true or not made with actual malice, not on whether a defamatory meaining was conveyed. Further, Fisher used the entire text of the publications as evidence in opposing the motion for summary judgment.

THE COURT PROPERLY DENIED FISHER's MOTION FOR AN IN CAMERA INSPECTION OF UNPUBLISHED NOTES

Copley Press initially refused a request to produce its employee's (Jacoby) unpublished notes, claiming privilege, but later produced them pursuant to court order.

Six months later Fisher again requested an order compelling production of Jacoby's

documents. Copley Press submitted Jacoby's declaration stating: "I have produced all those noted in my possession or under my control. There are other matters in my notebook which have nothing to do with the Fisher matter and which this Court should not require me to produce." The court denied Fisher's motion and her request for an in camera inspection of Mr. Jacoby's entire notebook.

Code of Civil Procedure section 2034 pertaining to a motion to compel the production of documents leaves the decision to make an in camera inspection of documents to the court's discretion. The record shows no abuse of discretion here. (Dowell v. Superior Court (1956) 47 Cal.2d 483, 486 [304 P. 2d 1009].)

THE COURT DID NOT ERR IN DENYING FISHER'S MOTION TO CONTINUE THE SUMMARY JUDGMENT HEARING

On February 20, 1980, Fisher formally discharged her attorney, substituted herself,

and moved for a continuance to obtain new counsel and complete

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discovery. The trial court found the motion both untimely and without a showing of good cause.

Generally, power to determine when a continuance should be granted is within the discretion of the court, and there is no right to a continuance as a matter of law. (Thurmond v. Superior Court (1967) 66 Cal.2d 836, 838-840 [59 Cal.Rptr. 273, 427 P.2d 9851].) However, Code of Civil Procedure section 437c mandates a continuance of a summary judgment hearing upon a good faith showing by affidavit that a continuance is needed to obtain facts essential to justify oppostion to the motion. Fisher sought to justify a continuance because she desired additional discovery of the Copley Press personnel and Scott-Blair.[18]

It is not an abuse of discretion to deny

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a continuance to discover further evidence where the action has been pending a long time and extensive discovery has already been conducted. (Vanderbilt Growth Fund, INc. v. Superior Court (1980) 105 Cal.App.3d 628 [164 Cal.Rptr. 621].) Here, Fisher pursued an ambitius discovery schedule for more than two years, took dozens of depositions and sent out numerous interrogatories. She had already deposed numerous Copley representatives including the publisher, editor, assistant editor, city editor, the reader's representative, the reporter of the subject articles, an employee of Copley International, a reporter for the Tribune and Scott-Blair. Although appearing without counsel, she eloquently, and at length, argued her case. Further, the court received extensive evidence by way of the exhaustive discovery already taken.

While we believe Fisher's request for continuance was not untimely, we find no

good cause for the request. Her attorney was discharged because Fisher believed his efforts in pursuing discovery[19] were insufficient. There is no showing he would not have represented her at the hearing except for the discharge. His past performance reveals he was capable, and had established a good rapport with the trial court. Further, Fisher failed to show she would procure other counsel in the reasonably near future.[20]

The court in a public-figure libel case has the power to control and limit discovery (Herbert v. Lando (1979) 441 U.S. 153, 177 [60 L.Ed.2d 115, 134, 99 S.Ct. 1635].) The trial court properly exercised its sound discretion in deny-

[138 Cal.App.3d 649]

ing the continuance. Although Fisher had ample opportunity, she does not show how she was prejudiced by the denial of a continuance, either in her points and authorities filed after the hearing on the summary judgment

motion, in her declarations in support of her motion for reconsideratin of the summary judgment, or in her appellate presentations.

THE COURT PROPERLY REFUSED TO ENTER FINDINGS OF FACT AND CONCLUSIONS OF LAW

Fisher is not entitled to findings of fact and conclusions of law on the summary judgments. (Perry v. Farley Bros. Moving & Storage, Inc. (1970 6 Cal.App.3d 884, 889 [86 Cal.Rptr. 397].)

THE MOTION TO AMEND AFTER SUMMARY JUDGMENT WAS PROPERLY DENIED

Fisher knew of the motions for summary judgment as early as January 6, 1981, but took no action to amend for five months. The rights to amend a complaint rest within the sound discretion of the court (Robinson & Wilson, Inc. v. Stone (1973) 35 Cal.App.3d 396, 413 [110 Cal.Rptr. 675]), and may be denied where there has been a long delay in seeking the amendment. (Rainer v. Community Memorial Hosp. (1971) 18 Cal.App.3d 240,

258 [95 CAl.Rptr. 901].) The court was within its discretion in denying the amendment.[21]

DISPOSITION

The orders sustaining demurrers are affirmed.

Summary judgments on the first and second causes of action are affirmed in favor of Edwin Gray, and reversed as to Yvonne Larsen, W. Daniel Larsen and Joseph Harmon.

Summary judgments on the sixth and ninth causes of action are affirmed in favor of Joseph Harmon, and reversed as to Yvonne Larsen, W. Daniel Larsen and Edwin Gray.

Summary judgments on the third, fourth, fifth, seventh, tenth and eleventh causes of action are affirmed.

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Summary judgment on the eighth cause of action is reversed.

On remand the superior court shall strike the prayer for special damages from all remaining causes of action.

Wiener, Acting P.J., and Zumwalt,J. (assigned by the Chairperson of the Judicial Council) concurred.

FOOTNOTES

1. Yvonne Larsen, W. Daniel Larsen, her husband, Joseph Harmon and Edwin Gray.

2. Carlin v. Board of Education, San Diego Superior Court No. 303800.

3. Without relevant opposing declarations, or citations to the material portions of the forty depositions and other documents subsequently lodged, it is not surprising the trial court failed to locate the relatively few items supporting Fisher's position.

4. Code of Civil Procedure, section 437c reads in part: "If it appears that the proof supports the granting of [a summary judgment] motion as to some but not all the issues involved in the action,...the court shall, by order, specify that such issues are without substantial controversy...and the action shall proceed as to the issues remaining."

5. We do not consider the propriety of seeking such damages as an adjunct to other legal actions, although we are aware they have been disallowed for personal injury (Chrysler Corp. v. Todorovich (Wyo. 1978) 580 P.2d 1123, 1124), and for conspiracy (Ferguson v. Washburn (Tex. 1928) 4 S.W.2d 574, 576).

6. The summary judgments were granted on causes of action pleaded in Fisher's second amended complaint; therefore, different

causes of action discussed in various portions of this opinion are identically numbered.

7. Harmon is not shown to be involved in the acts of which Fisher complains in her sixth cause of action.

8. The detailed alleged criminal conduct to support its labeling as "blackmail and bribery" transcends the mere use of such terms as a literary device for ridiculing political conduct. (See Bird, C.J., dis. Good Government Group of Seal Beach, Inc. v.- Superior Court, supra, 22 Cal.3d at p. 689.)

9. Although labeled "blackmail," the language stated only can be reasonably interpreted as an attempt to "obtain..an official act of a public officer, induced by a wrongful use of fear" constituting felony of attempted extortion. (Pen. Code, 518, 524.) (Isaac v. Superior Court (1978) 79 Cal. App.3d 260 [146 Cal.Rptr. 396].) The language is clearly susceptible to the plain meaning Fisher intended to expose some secret of the superintendent damaging to his reputation, in order to force him to subvert his official position to avoid exposure. (Pen. Code, 519, subd. 4.)

10. The document relied upon by the Larsens entitled "Chronology and Events Leading To and Occurring During June 6-9, 1977 Teachers' Strike Against San Diego City Schools" was apparently prepared by Goodman after the strike had terminated, after the Board of Education had granted blanket amnesty to the strikers and after Fisher made her charges against Goodman in the open board meeting. (It even contains some post-strike editorial comment by Goodman.) The 7-page "chronology" cannot be read as an unbiased report of events insofar as it refers to

Fisher's activities. Yet, it is the only document upon which the Larsens claim to have relied.

11. Gray is not shown to have been involved with the incidents described in these two causes of action which occurred approximiately July 27, 1977.

12. On the inside page, the article mentions Fisher had earlier denied the allegations underlying Larsen's charges, when Superintendent Goodman had publicly accused her of threatening to get him if he did not accede to strikers' demands.

13. For a historical overview of even more seamy political aspersions, see Desert Sun Publishing Co. v. Superior Court (1979) 97 Cal. App.3d 49 [158 CAl.Rptr. 519].

14. Civil Code section 48a, subdivision 1 reads: "Special damages; notice and demand for correction. In any action for damages for the publication of a libel in a newspaper, or of a slander by radio broadcast, plaintiff shall recover no more than special damages unless a correction be demanded and be not published or broadcast, as hereinafter provided. Plaintiff shall serve upon the publisher, at the place of publication or broadcaster at the place of broadcast, a written notice specifying the statements claimed to be libelous and demanding that the same be corrected. Said notice and demand must be served within 20 days after knowledge of the publication or broadcast of the statements claimed to be libelous."

15. The demurrers were sustained to portions of Fisher's first amended complaint.

16. We question whether Fisher's failure

to include these specific causes of action in her superseding, second amended complaint precludes her from attacking the orders sustaining demurrers. (See Witczak v. Johnson (1956) 146 Cal.App.2d 599, 601 [303 P. 2d 1091].)
However, the defendants have not argued this point.

17. Two of the publications pertained to the Larsen campaign defendants. Larsen's speech about Fisher's charges against Superintendent Goodman was incorporated in the seventh cause of action of the original and first amended complaints. The trial court struck portions of this speech from the complaint. Larsen's news release about Fisher violating the Pupil Privacy Law was incorporated in the thirteenth cause of action of the first amended complaint. The trial court struck portions of this news release.

18. She also wished to depose two superior court judges and to explore the possibility San Diego Federal Savings and Loan Association was involved in the "conspiracy" against her. However, she makes no showing this discovery was necessary to oppose the summary judgments.

19. The record reveals the efforts of Fisher's attorney were prodigious.

20. At oral argument, 19 months later, Fisher, who has effectively represented herself on this appeal, was still without counsel.

21. Fisher also purports to appeal from a denial of her motion to reconsider the court's orders denying her continuance of the summary judgment hearings and granting the summary judgments. (Code Civ. Proc.,

1008.) However, the court actually granted her request to reconsider, read the supporting documents (which included no new facts) and with exceptional patience and courtesy listened to rambling oral argument. Only then did the court affirm its previous rulings.

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

4th District, Division 1, No. D002152

SUPREME COURT
FILED
JUL 30 1986
Laurence P. Gill, Clerk
DEPUTY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

FISHER

v.

LARSEN et al.

Appellant's petition for review DENIED.

BIRD

Chief Justice

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COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

RECEIVED
OCT 24 1986
Court of Appeal Fourth App.
San Diego

JULIE FISHER,

Appellant

vs.

YVONNE LARSEN, W. DANIEL LARSEN, JOSEPH HARMON, EDWIN GRAY, MICHAEL SCOTT-BLAIR, THE COPLEY PRESS, INC.

Appellees

CASE NO. D 002152

SDSC Case No. 420137

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that JULIE FISHER, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Fourth District Court of Appeal issued on April 24, 1986. The order of the California Supreme Court denying review of the decision was filed on July 30, 1986.

This appeal is taken pursuant to 28 U.S.C. 1257(2).

Julie Fisher

Julie Fisher, Appellant
3726 Charles Street,
San Diego, Calif. 92106
(619) 223-6623

SUPERIOR COURT OF THE STATE OF CALID\FORNIA

FOR THE COUNTY OF SAN DIEGO

JULIE FISHER, Plaintiff, V. YVONNE LARSEN, et.al., Defendants	CASE NO. 420137 SPECIAL VERDICT

The defendants have the burden of proof as to issue numbers 1, 15, and 29; the plaintiff has the burden of proof as to all other issues.

We, the jury in the above-entitled case, find the following Special Verdict on the issues submitted to us:

Issue No. 1: Was the following statement made by Yvonne Larsen, W. Daniel Larsen, and Joseph Harmon substantially true: "Do taxpayers like it when Julie Fisher appears at union rallies and supports their demands?"

Answer "yes" or "no".

Answer:_____

If you have answered Issue No. 1 "yes", then skip Issues Nos. 2 through 14, and answer Issue No. 15. If you have answered Issue No. 1 "no", then answer the next six issues.

Issue No. 2: At the time of publication, did Yvonne Larsen know that the statement was false?

Answer:_____

Issue No. 3: At the time of publication, did Yvonne Larsen act with reckless disregard for the truth?

Answer:_____

Issue No. 4: At the time of publication, did W. Daniel Larsen know that the statement was false?

Answer:_____

Issue No. 5: At the time of publication, did W. Daniel Larsen act with reckless disregard of the truth?

Answer:_____

Issue No. 6: At the time of publication

did Joseph Harmon know the statement was false?

Answer:_____

Issue No. 7: At the time of publication did Joseph Harmon act with reckless disregard for the truth?

Answer:_____

If you have answered "no" to all six of the preceding issues, then skip Issues Nos. 8 through 14, and answer Issue No. 15. If you have answered "yes" to one or more of the six preceding issues, then answer the following issues.

Issue No. 8: What is the amount of damages suffered by plaintiff as a proximate result of the publication of the statement?

Answer: $_____

Issue No. 9: At the time of the publication of the statement in Issue No. 1, was Yvonne Larsen actuated by factors justifying an award of punitive damages?

Answer:_____

If you answer to Issue No. 9 is "yes", then

answer the next issue. If your answer to Issue No. 9 is "no", then skip Issue No. 10 and answer Issue No. 11.

Issue No. 10: What amount of punitive damage, if any, do you assess against Yvonne Larsen for sake of example and by way of punishment?

Answer: $_____

Issue No. 11: At the time of the publication of the statement in Issue No. 1, was W. Daniel Larsen actuated by factors justifying an award of punitive damages?

Answer:_____

If your answer to Issue No. 11 is "yes", then answer the next issue. If your answer to Issue No. 11 is "no", then skip Issue No. 12 and answer Issue No. 13.

Issue No. 12: What amount of punitive damage, if any, do you assess against W. Daniel Larsen for sake of example and by way of punishment?

Answer: $_____

Issue No. 13: At the time of the publication of the statement in Issue No. 1, was Joseph Harmon actuated by factors justifying an award of punitive damages?

Answer:_____

If your answer to Issue No. 13 is "yes", then answer the next issue. If your answer to Issue No. 13 is "no", then skip Issue No. 14 and answer Issue No. 15.

Issue No. 14: What amount of punitive damage, if any, do you assess against Joseph Harmon for sake of example and by way of punishment?

Issue No. 15: Was the following statement by Yvonne Larsen, W. Daniel Larsen and Edwin Gray substantially true:

"We watched her as she leveled a series of scurrilous charges against the superintendent of schools. This sorry chapter in the history of our schools was nothing less than blackmail."

"She told the superintendent that if he

agreed to collaborate with the teachers union, she would see to it that he would gain such a good reputation that he could name his job anywhere in the country."

"But, if he refused, she would get him. She would accuse him of many things and publicly call for his resignation."

"The superintendent refused to go along with what was almost a form of bribery."

"Frankly, I hold no brief, either for or against the superintendent. He was fully able to defend himself against the false and vicious charges he was threatened with."

"But outright blackmail is not a quality I take too lightly."

"Their strike -- by any standard -- was illegal. In my opinion, it also was immoral. And my opponent was associated with it every step of the way."

"Her vote, coming as it did from one who earlier sought to blackmail the school superintendent, should not have been sur-

prising."

"...she violated her public trust by passing on confidential, privileged information to the plaintiffs in the Carlin case. Superior Judge Welsh characterized her irresponsible actions as those of a "turncoat" and a "renegade."

Answer:_____

If you have answered Issue No. 15 "yes", then skip Issues Nos. 16 through 28, and answer Issue No. 29. If you have answered Issue No. 15 "no", then answer the next six issues.

Issue No. 16: At the time of publication, did Yvonne Larsen know that the statement set forth in Issue No. 15 was false?

Answer:_____

Issue No. 17: At the time of publication, did Yvonne Larsen act with reckless disregard for the truth?

Answer:_____

Issue No. 18: At the time of publication,

did W. Daniel Larsen know that the statement set forth in Issue No. 15 was false?

Answer:_____

Issue No. 19: At the time of publication, did W. Daniel Larsen act with reckless disregard of the truth?

Answer:_____

Issue No. 20: At the time of publication did Edwin Gray know that the statement set forth in Issue No. 15 was false?

Answer:_____

Issue No. 21: At the time of publication, did Edwin Gray act with reckless disregard for the truth?

Answer:_____

If you have answered "no" to all six of the preceding issues, then skip Issues Nos. 22 through 28, and answer Issue No. 29. If you have answered "yes" to one or more of the six preceding issues, then answer the following issues.

Issue No. 22: What is the amount of damages

suffered by plaintiff as a proximate result of the publication of the statement set forth in Issue No 15?

Answer: $_____

Issue No. 23: At the time of the publication of the statement in Issue No. 15, was Yvonne Larsen actuated by factors justifying an award of punitive damages?

Answer:_____

If you answer to Issue No. 23 is "yes", then answer the next issue. If your answer to Issue No. 23 is "no", then skip Issue No. 24 and answer Issue No. 25.

Issue No. 24: What amount of punitive damage, if any, do you assess against Yvonne Larsen for sake of example and by way of punishment?

Answer: $_____

Issue No. 25: At the time of the publication of the statement in Issue No. 15, was W. Daniel Larsen actuated by factors justifying an award of punitive damages?

Answer:_____

If your answer to Issue No. 25 is "yes", then answer the next issue. If your answer to Issue No. 25 is "no", then skip Issue No. 26 and answer Issue No. 27.

Issue No. 26: What amount of punitive damage, if any, do you assess against W. Daniel Larsen for sake of example and by way of punishment?

Answer: $_____

Issue No. 27: At the time of the publication of the statement in Issue No. 15, was Edwin Gray actuated by factors justifying an award of punitive damages?

Answer:_____

If your answer to Issue No. 27 is "yes", then answer the next issue. If your answer to Issue No. 27 is "no", then skip Issue No. 28 and answer Issue No. 29.

Issue No. 28: What amount of punitive damage, if any, do you assess against Edwin Gray for sake of example and by way of

punishment?

Issue No. 29: Was the following statement by Yvonne Larsen, W. Daniel Larsen, and Edwin Gray substantially true: "Julie Fisher's collaboration last spring with the striking teachers -- who defied the law and a judge's order -- was, in my opinion, a direct violation of her oath of office to uphold the law."

Answer:_____

If you have answered Issue No. 29 "yes", then you have completed the special verdict and need not answer any more issues. If you have answered Issue No. 29 "no", then answer the next six issues.

Issue No. 30: At the time of publication, did Yvonne Larsen know that the statement set forth in Issue No. 29 was false?

Answer:_____

Issue No. 31: At the time of publication, did Yvonne Larsen act with reckless disregard for the truth?

Answer:_____

Issue No. 32: At the time of publication, did W. Daniel Larsen know that the statement set forth in Issue No. 29 was false?

Answer:_____

Issue No. 33: At the time of publication, did W. Daniel Larsen act with reckless disregard of the truth?

Answer:_____

Issue No. 34: At the time of publication did Edwin Gray know that the statement set forth in Issue No. 29 was false?

Answer:_____

Issue No. 35: At the time of publication, did Edwin Gray act with reckless disregard for the truth?

Answer:_____

If you have answered "no" to all six of the preceding issues, then you have completed the special verdict and need not answer the remaining issues. If you have answered "yes" to one or more of the six preceding issues, then answer the following issues.

Issue No. 36: What is the amount of damages suffered by plaintiff as a proximate result of the publication of the statement set forth in Issue No 29?

Answer: $_____

Issue No. 37: At the time of the publication of the statement in Issue No. 29, was Yvonne Larsen actuated by factors justifying an award of punitive damages?

Answer:_____

If you answer to Issue No. 37 is "yes", then answer the next issue. If your answer to Issue No. 37 is "no", then skip Issue No. 38 and answer Issue No. 39.

Issue No. 38: What amount of punitive damage, if any, do you assess against Yvonne Larsen for sake of example and by way of punishment?

Answer: $_____

Issue No. 39: At the time of the publication of the statement in Issue No. 29, was W. Daniel Larsen actuated by factors justifying an

award of punitive damages?

Answer:_____

If your answer to Issue No. 39 is "yes", then answer the next issue. If your answer to Issue No. 39 is "no", then skip Issue No. 40 and answer Issue No. 41.

Issue No. 40: What amount of punitive damage, if any, do you assess against W. Daniel Larsen for sake of example and by way of punishment?

Answer: $_____

Issue No. 41: At the time of the publication of the statement in Issue No. 29, was Edwin Gray actuated by factors justifying an award of punitive damages?

Answer:_____

If your answer to Issue No. 41 is "yes", then answer the next issue. If your answer to Issue No. 41 is "no", then you have completed the special verdict and need not answer any more issues.

Issue No. 28: What amount of punitive

damage, if any, do you assess against Edwin Gray for sake of example and by way of punishment?

OPPOSES TEACHER STRIKE

Yvonne Larsen To Seek Fisher Seat On Board

Yvonne W. Larsen, the fifth person to seek the city Board of Education seat for District C, said yesterday that she is opposing incumbent Julie Fisher because Fisher "has seen fit to serve only the interests of the San Diego Teachers Association leaders with total disregard toward the people who elected her."

Larsen, who is a trustee of the California State University and Colleges system, filed her intention to seek election before the deadline last Friday, but did not hold a press conference to formally announce her candidacy until yesterday.

She said she believes San Diegans do not like a member of the Board of Education who encourages teachers to go on strike.

"Do taxpayers like it when Julie Fisher appears at the union rallies and supports their demands?

"And then once the strike is over, giving those striking members total amnesty from their defiance of the court order (to return to work) and their loss on the job? I am convinced

YVONNE W. LARSEN
'. . . citizens not represented'

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"Do taxpayers like it when Julie Fisher appears at the union rallies and supports their demands?

"And then once the strike is over, giving those striking members total amnesty from their defiance of the court order (to return to work) and their loss on the the job? I am convinced that San Diegans will answer with a loud 'no' to each of these questions," she said.

Larsen made no attempt to hide her disagreement with Fisher's board record.

Would Reverse Vote

The board recently voted 3 to 2 to grant the teachers amnesty after the June strike, but Larsen said, "had I been on the board, it would definitely have been a 3 to 2 vote the other way."

She accused Fisher of "irresponsible and disruptive behaviour at board meetings, and said, "the citizens of District C are not being represented in their best interests."

Larsen said, "The board is far too divided at present to tackle the problems it faces in the next four years. Problems like busing, school financing, and equal and quality education for all.

"These problems can only be resolved by someone with a rational and businesslike approach. Emotional and unreasonable demands will not do." she said.

For Voluntary Desegration

Larsen said she supports voluntary school desegregation efforts, and believes there is reason to have confidence that they can be made to work.

She said she is not acquainted with or supported by any of the current board members, and does not know any of the other three candidates challenging Fisher.

"I was encouraged to run by people in the District C area (which includes Ocean Beach, Mission Beach, Pacific Beach, Mission Bay Park, Clairemont, Linda Vista, Old Town, Mission Hills and Hillcreat), she said.

She said it is "sometimes forgotten that 72 per cent of the people in San Diego do not have children in the school system."

Interests Not Represented

Those people are "expected to support the schools, yet nobody ever bothers to represent their interests, she said.

"A member of the Board of Education must walk a fine line between serving their

constituents, and the best interests of our school-age children. I will do my best to serve all interests, always mindful of the students' best interests," she said.

Larsen was appointed to the state university Board of Trustees by former Gov. Ronald Reagan to complete an unexpired term in 1974 and 1975. She lost her seat when Gov. Brown was elected. She has lived in San Diego since 1945, and is married to W. Daniel Larsen, president of the San Diego Taxpayers Association.

She serves on the advisory boards of San Diego State University and KPBS Channel 15, and is treasurer of the Armed Services YMCA board of management, and co-chairman of the major mission fund at the Point Loma Community Presbyterian Church.

Larsen is also a past president of the Junior League of San Diego, Inc., a past secretary of the San Diego Symphony Orchestra Association, membership chairman of the

Women's Committee for Cerebral Palsy, a former PTA board member of the Loma Portal, Silvergate and Dana schools, and a former trustee of the Children Hospital and Health Center.

CALLED DISRUPTIVE FORCE ON SCHOOL BOARD

District Challengers Agree On One Thing: Fisher Must Go

By MICHAEL SCOTT-BLAIR
Education Writer, The San Diego Union 8-31-77

The three challengers for the District C seat on the city Board of Education do not think much of the incumbent, Julie Fisher, and they do not hesitate to say so. In fact, it is usually one of the first things they say when discussing the election.

"I am appalled and enraged by her behavior on the board," said Yvonne Larsen.

"The incumbent is completely and totally ineffective," said Barbara Brown

Asked if that meant the other four members were not representing the community, Fisher said it would be necessary to ask them that question.

Fisher also said that "on those 4-1 votes you will always find that I have done extensive research work, and the other board members have not.

Blanket Indictments Opposed

"There is a national weakness among local boards of education in that they support their administrations," Fisher said

JULIE FISHER
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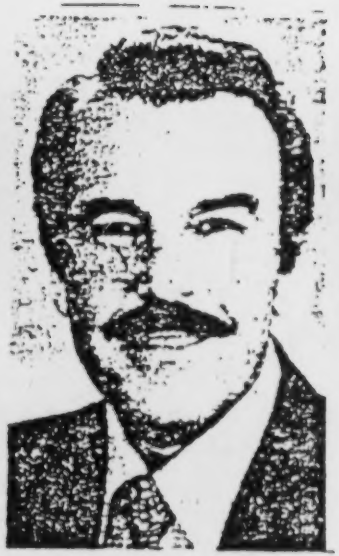
BARBARA BROWN
. . . husband would help



JACK De BARROWS
. . . forced busing foe

YVONNE LARSEN
. . . test before promotion

The three challengers for the District C seat on the city Board of Education do not think much of the incumbent, Julie Fisher, and they do not hesitate to say so. In fact, it is usually one of the first things they say when discussing the election.

"I am appalled and enraged by her behavior on the board," said Yvonne Larsen.

"The incumbent is completely and totally ineffective," said Barbara Brown.

"She has nothing but a disruptive influence on the board which means that little serious discussion can take place," said Jack H. De Barrows.

And Fisher responds, "Obviously they can't attack me on the issues, so they have to resort to attacking me personally."

Deeper Than Tradition

But the challengers insist that their charges go deeper than traditional election campaign tactics and rhetoric.

"The constant bickering and personality

clashes among board members is a matter of public concern," said De Barrows, 55, district secretary of the The California-Hawaii-Northern Nevada District of Exchange Clubs.

"In my talks with parents and other taxpayers in this district I have found the major concerns to be taxes, busing and board bickering - that makes it very important," he said.

"I've studied San Diego's education system for the past 15 years and attended board meetings for five years." said Brown, 49, legislative chairwoman of the 9th district PTA.

"Julie Fisher makes good copy, but she does little that really helps the students or the education system.

"Beyond her personal ineffectiveness, she tends to aggravate the other board members to the point that it reduces their effectiveness. She has got to go," said Brown.

In her four years on the board to date, Julie Fisher, 44, and a math instructor, has been a colorful and often controversial member, openly clashing with fellow members Dorothea Edmiston and the Rev. George Smith, and constantly accusing the district administration of either being misleading or of outright wrongdoing.

On many major issues, the board has consistently filed a 4-1 vote with Fisher objecting, or a 4-0 with Fisher abstaining.

Fisher denies all accusations that this is an attempt to be deliberately obstructive, saying her disagreements with the rest of the board often arise from the fact that she has "done my homework" and the other members have not, and that "my board membership is active rather than passive."

"When we have those 4-1 votes, I am representing the majority of the community," she said.

Asked if that meant the other four members

were not representing the community, Fisher said it would be necessary to ask them that question.

Fisher also said that "on those 4-1 votes you will always find that I have done extensive research work, and the other board members have not.

Blanket Indictments Opposed

"There is a national weakness among local boards of education in that they support their administrations," Fisher said.

The challengers oppose Fisher's frequent blanket indictments of the district administration, and especially School Supt. Thomas L. Goodman.

"She has made many accusations against the administration and Goodman which have been proved false," said Larsen, 47, a homemaker and former trustee of California State Universities and Colleges.

"I think we have a well-run district. That is not to say we can't work to improve

it, but it is time these criticisms of the district for political reasons were stopped." she said.

De Barrows said, "When you pay a man more than $50,000. a year to do a job, then you work with him until you find that he is violating your policies, and then you fire him. But you don't keep sniping at him - that is a waste of the taxpayers' money.

"Fisher keeps wanting to get rid of Goodman for no particularly good reasons. But there again, she does not seem to be able to work well with anyone except the teachers' union." he said.

Support For Teachers' Union

Fisher's support of the teachers' union is a major point of difference between her and the challengers.

She openly supported the teachers during their four-day strike in June; blames the board's "inflexible attitude on negotiations" for causing the strike, and moved the succes-

sful motion that granted full amnesty to all striking teachers after they had ignored three court orders to return to work.

That amnesty vote passed 3 to 2 with John Witt and Phil Halfaker backing Fisher.

But all three challengers for Fisher's seat said, "It would have been 3-2 the other way if I had been on the board."

But Fisher stands firmly behind her decision.

"If I had to go through that again I would repeat my motion granting complete amnesty to the striking teachers - absolutely, yes - if we had not done that, the teachers would still be on strike," she said.

Study Group Planned

Fisher was endorsed by the teachers' union for her first term, and last week, the San Diego Teachers Association board of directors announced that they have endorsed her again.

"But I believe she will lose the support of many individual teachers and many members

of the general public after the way she conducted herself during that strike," said Larsen.

One of Fisher's principal aims for the coming four years is to establish an independent study group that will be able to evaluate all proposals to the board from the administration, before those proposals reach the board.

Fisher said that such a body must be independent of the administration and its members must be able to criticize administration proposals without fear for their jobs.

It is not a new idea. Fisher has proposed it repeatedly to the other board members already, but received absolutely no support.

De Barrows says he disagrees with the proposal.

"Fisher just doesn't trust anyone, and now she wants a staff to check the staff. That's utter nonsense," he said.

Brown also opposes this suggestion, saying,

"Fisher is so hung up on the idea of being out to get the administration, that it blinds her to effective action in other areas.

"She believes she is being constantly lied to by the administration and finishes up pushing her personal ideas rather than listening to what other people have to say," Brown said.

On school desegregation, Brown says the district has "dragged its feet a little" over the past 10 to 15 years.

"But there was nothing malicious or premeditated in their actions," she said.

Earlier Problems Forgotten

"Maybe people have forgotten the tremendous problems faced by the district during the recent years of rapid city growth, when parents were clamoring for schools and the district was wrestling with crowded classrooms.

"In the press of those matters, desegregation did not get a very high priority, but now it

must be No. 1," she said.

Like the other candidates, Brown expresses strong support for voluntary desegregation.

"The district should have three years to show that voluntary efforts can work, but after that, we must be ready to take another look at those isolated schools and see if the harm of isolation has been reduced and can be eliminated.

"If we conclude that the voluntary effort is not sufficient, then we must be ready to introduce mandatory methods," she said.

Larsen says that increased pressure must be put on other local government agencies to force them to help the school district in its desegregation efforts.

"The district is not getting much help at present. It seems as though they are sitting back, waiting for each other to move," she said.

De Barrows says he is "unalterably opposed to forced busing."

"I see no real limit to how long we should work hard to make voluntary programs work. If I have the chance to vote against forced busing, I will do it to the very last moment. I will support the law if the court makes it an order, but I will oppose it right up to that point," he said.

De Barrows also expresses opposition to teacher strikes, saying, "Though I believe the teachers were pushed into their strike by an insensitive board, I am opposed to the militant nature of the teachers' association."

"Hugh Boyle (president of the teacher union at the time of the strike) looked as though he should have been talking to people down on the docks or to Teamster union members.

Brown repeated her opposition to strikes.

"It seems that the world of the classroom and the superintendent's office are being constantly separated by issues that have little to do with the teaching of children, and the incumbent seems determined to keep it

that way.

"There needs to be some harmony between the teachers and the administration and the board should be playing a role in bringing that about. But the board cannot bring harmony to anyone until there is some harmony in its own ranks," she said.

Current standards of education are a concern of all the candidates, all aggreeing that social promotions through the grades - based on the age of the student rather than ability - are wrong and only injure the students in the end.

"The kids who cannot perform should be held back, and I say that will all possible compassion for the kids involved," said De Barrows.

Fisher says she believes, "There should be some definite standards against which a student can measure academic progress.

Yearly Examinations Urged

"If a student is not up to par at the end

of the school year, summer programs should be available to give the student a chance to be ready for the coming year and avoid being held back," she said.

Larsen says she wants to see a final examination at the end of each grade and that should be used to determine promotion to the next grade.

Brown also supports a testing system to determine student promotion, but goes further and says that a quality secondary education should be given greater public status.

"America is still hung up on everyone getting some college education. I agree that everyone should be able to get it if they want it, but I disagree with all the social pressure that says you must have it," she said.

De Barrows says it is time for some strong board leadership that does not "bow to the particular demands of small groups.

"You have got to have board members who have the guts to say 'this is the way it

is going to be,' and stick by that, no matter whether it is holding Johnny back or dropping an ineffective program over the objections of some special interest group parents," he said.

De Barrows also says he will press for more discipline in schools.

"I am not really hard nosed, but if a teacher tells a student to sit down, that student should be forced to sit down and the teacher has every right to expect to be backed up in that," he said.

Larsen said she wants a thorough survey of the education programs presently being offered in the city with a view to introducing a little more standardization.

"We have programs going in every direction at the moment and there appears to be too much fragmentation, she said.

Larsen also points to her husband as a source of help to her should she be elected.

W. Daniel Larsen is executive director of

the San Diego Taxpayers Association and has been a student of the school district budget for many years.

However, she stresses, "I am running for the board, not my husband, though he is extremely supportive and we are a team effort."

Brown said that after her years of observing the board, she is "ready to run against anyone.

"I feel I really have the best possible knowledge to help me make a contribution to the board and to this community," she said.

District C is a heterogeneous area, Brown says, encompassing Point Loma, but a wide cross section of the city including Ocean Beach, Mission Beach, Pacific Beach, Mission Bay Park, Clairemont, Linda Vista, Old Town, Mission Hills and Hillcrest.

"I believe I can represent them all. I guess the conservatives will go with Larsen and the teachers with Fisher. Here I am, right in the middle of the road, and I believe

I am going to win because of that," she said.

Larsen says she can speak not only for the parents, but "for the 72 per cent of the people in this city who don't have children in the city schools.

"But just because they don't have children in the schools now does not mean they are not interested in education - they definitely are, but they are entitled to an assurance that their tax dollars are being spent in the best way possible, and I intend to work for that," she said.

This is a key concern of De Barrows, too.

"A lot of people in this area are retired and on fixed incomes, and they want to be able to feel confident that their tax dollars are well spent.

"I am not going to promise to lower taxes, and anyone who says they will is probably a liar, but I will certainly work to make sure every cent is well spent," he said.

Fisher says she already has made significant

contributions to these ends through pushing improved energy policies, a reduction in wasteful truancies, better education programs and her fight to cut the size of the district administration.

IN BOARD RACES

City Teachers Show Political Strength

UNION SEP 21 1977

By MICHÁEL SCOTT-BLAIR
Education Writer, The San Diego Union

San Diego teachers once again showed their remarkable political strength in Board of Education elections last night, pitting an unknown newcomer, John S. Adler against incumbent Phil Halfaker, and keeping controversial incumbent Julie Fisher narrowly ahead of a well financed campaign by Yvonne Larsen.

It has set the scene for one of the most important city school Board of Education general elections in decades. That election will be Nov. 8.

There is no doubt that the teachers will be out in force with a good chance of putting two strong teacher advocates on to the five-member board.

Scene Set For Important School Board General Vote

UNION SEP 21 1977

Fisher, and Adler - who surprisingly rode right over the better known City Councilman Mac Strobl - are strong supporters of collective bargaining, which is one of the sorest thorns in most board members' sides.

That support brought Fisher and Adler the endorsement of the San Diego Teachers Association, and is certain to ensure that endorsement in November.

In District C, voters will face a distinct choice between Fisher and her challenger, Yvonne Larsen, who as a newcomer ran a strong race against the widely known incumbent.

Not only are the styles of the two women polls apart but

their philosophies have virtually nothing in common.

Fisher supported and marched with the striking teachers last June, and fought to get them amnesty after they returned to work.

Larsen is totally opposed to such strikes and would never have granted the amnesty.

Fisher has attacked the school desegregation plan, even supporting some of the city's more extreme groups in an effort to discredit the district administration; Larsen has called for wide-spread support of the plan.

The vote shows that Fisher's support might have been eroded.

TOUGH TO BEAT

There is a saying among even her bitterest opponents that "Julie is darned tough to beat."

Yet a political newcomer was able last night to give a her a strong challenge, and make a clear-cut race of their two philosophies, eclipsing the other two challengers.

Larsen has the strong backing of the more

conservative elements of District C, calling for much greater concentration on basic education.

There styles in November will be as different as their positions.

HOW THEY DIFFER

Larsen is polished, sophisticated, conservative in many ways, not too interested in all the experimental educationally innovative of the past decade, but concerned with basic education, law and order, employer-employe relative postures and fiscal responsibility.

Usually wearing a light smile, she can become very serous quickly, and there is a touch of steel under the surface.

Fisher fights back from corners. Her deep brown eyes can flash anger in a second, but she can replace that with one of the fastest smiles in town. You can fight with Fisher but she does not bruise easily. She has sat calmly smilingly acknowledging some

of the most extensive tonguelashings from board President the Rev. George W. Smith, that have ever been seen on a local city board.

Fisher offers support for many of the things Larsen endorses, but more generally is found to be backing causes rather than substantive issues, and is eager to leap to the assistance of almost every seemingly distressed special interest group, especially if it offers the chance for a pot-shot at the administration.

VICIOUS RACE SEEN

As one observer said last night. "I almost shudder to think about this race in the next two months. It could be vicious."

Halfaker would do well to take a lesson from history as he prepares for the general election.

Four years ago, an unknown called Julie Fisher was backed by the teachers and defeated a well-known incumbent, Louise Dyer, who ran largely on her record believing that should

be enough to return her to the board.

This year, an unknown called John S. Adler is backed by the same teacher's organization against a well-known incumbent, Phil Halfaker, who ran a lack-luster primary campaign, depending on his record to get him through.

BIG CAMPAIGN

Last night he admitted that his efforts in the primary would not do for the general election.

"I am saving my campaign for November, that will be the big one," he said.

But Adler now has momentum - a remarkable amount of momentum for someone who faced not only the well-known Halfaker, but an even better-known challenger, Mac Strobl, who is leaving the City Council and was soundly beaten in last night's effort to get on the Board of Education.

Four years ago it was Halfaker who was endorsed by the teachers as he ran a three-was race for a vacant seat.

That year, he had a lot of his campaign work done for him by the teachers association.

ABANDONED

This year, not only has he been abandoned by the teachers, but they are supporting Adler against him. That makes for an uphill fight in developing a campaign with the speed to overtake the young attorney.

For the public the choice will be fairly clear.

If Fisher and Adler win, the teachers' position on the board will be strong, both members supporting collective bargaining, even though Adler opposes strikes.

If Larsen beats Fisher, it will be a vote against her flamboyant style as much as against her philosophies, and a return to the more orderly days of business before the school board.

BLOW TO TEACHERS

It will be a blow to the teachers. There is little doubt that Larsen will support

present members Smith and Dorothea Edmiston, and the district administration would be strengthened.

The more conservative hand of Smith, Edmiston and and defeat Adler, because Halfaker has demonstrated in the past that he can be swayed by strong arguments, and that would be a strong trio making the arguments.

Should Adler defeat Halfaker and join Larsen on the board, the weight on the teachers' cause would fall on his shoulders.

Some observers believe that might be to the teachers' advantage.

The Community College Board of Trustees races were predictably lacking in surprises. Lou Ridgeway in District C was the only one of three trustees to face any threat in the primary, with a challenge from two political newcomers.

But an almost complete lack of campaign issues let Ridgeway ride his incumbent's advantage to a clear lead, leaving sociol-

ogist and educatior Thomas Gillette and community leader Ardetta Steiner to fight for the right to meet Ridgeway in November.

With little else to separate the two, the voters went for the educator - who also received some endorsements - but the chances of Gillette overhauling Ridgeway in November appear slim at present.

There are still no real issues that appear likely to surface, and Gillette's primary campaign effort gave little indication that he has many significant points to raise in the next two months.

In District A, incumbent Dan Grady stayed ahead of his only challenger, Mary Christian Heising, and they will meet again in November. Charles Reid is unopposed for re-election in District E.

BEST AV

Julie Fisher Campaign

UNION OCT 19 1977

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By MICHAEL SCOTT-BLAIR
Education Writer, The San Diego Union

Two re-election campaign claims being made by incumbent Board of Education member Julie Fisher were denied yesterday by most of the people involved. B3

The claims being made by Fisher are that the San Diego school integration plan is a mandatory program, and that three of the four contestants for the two board seats have agreed to limit their campaign expenses for the November general election.

The campaign expenses have become a major issue between Fisher and her opponent for the District C seat on the board, Yvonne Larsen.

In the primary, Fisher raised $2,387 and spent $1,352 while Larsen raised $15,106 and spent $10,364.

In recent public appearances, Fisher has said that she has an agreement with District B candidates Dr. Phil Halfaker, the incumbent, and challenger John Adler, to put a limit on their spending for the November general election, but that Larsen will not agree.

Yesterday, Halfaker said, "I have made absolutely no agreements with anybody to put any limits on campaign spending."

Adler said that there had been informal conversations on the subject, and he had said he would agree if all the others did, but he has no formal agreements on campaign limits.

Fisher said that Halfaker is now "reneging" on the agreement which she said occurred at a recent meeting at Standley Junior High School.

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Claims Denied By Others

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On the issue of mandatory student movements
school desegregation plan, Fisher has said repeate
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She said that during a recent board meeting
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Court Judge Louis M. Welsh on March 9 — but
participation at the centers will be voluntary.

At yesterday's board meeting, Fisher sought
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Fisher said that Halfaker is now "reneging" on the agreement which she said occurred at a recent meeting at Standley Junior High School.

At that meeting, Fisher said she proposed a limit of $15,000 (the maximum spent by any board candidate in the most recent elections two years ago) plus an inflation allowance.

She said that as she suggested it, Halfaker was nodding his head and he said, "I have no problem with that. I couldn't raise that kind of money anyway."

Fisher said yesterday that she considered that to be "a formal agreement to a campaign spending limit."

Halfaker said he was not nodding in any

form of agreement, he was nodding in acknowledgement of what she was saying. He agreed that he said he could not raise $15,000 plus and therefore any limit would not bother him, but that in no way constituted a formal agreement.

"In fact, if Mrs. Fisher remembers, I jokingly said that if any candidates had any extra money I would be happy to accept it as a contribution to may campaign.

"However, I have made no formal agreements with anyone at all," Halfaker said.

Adler said he remembered all the conversations referred to by Fisher and Halfaker, and that he left with the feeling that the ground had been laid for spending limits if everyone agreed, but no formal agreement was reached.

However, he said that such a limitation would not hurt him either because "There is no way I could raise that kind of money."

Larsen, who appears to be the only candidate

able to raise the amount of money being suggested as a limit, said she had not seen any such agreement and will not join one.

"If people want to get rid of Julie Fisher bad enough to contribute money to help me do just that, I am not going to tell them that they cannot contribute," she said.

On the issue of mandatory student movements in the city school desegregation plan, Fisher has said repeatedly that the learning centers proposed for later this year, will involve the forced busing of up to 900 students.

She said that during a recent board meeting she asked a school official if the program was mandatory and he answered that it was.

Since then, other board members and school officials have said that the program is mandatory for the district - it was an element of the school integration plan ordered by Superior Court Judge Louis M. Welsh on March 9 - but that student participation

at the centers will be voluntary.

At yesterday's board meeting, Fisher sought clarification and was told by Ed Fletcher, assistant supt. for community relations, that student participation will be voluntary but the district must introduce the program because it is a specific part of the court order.

Deputy Supt. Charles Patrick said, "Student participation in the learning centers will be in compliance with the board directive that it be voluntary."

Board President the Rev. George Smith said later that there had been some confusion and misinterpretation of what was meant by the program being mandatory, but he hoped "that it is now clear - the program is mandatory because the judge ordered it, but we will be seeking volunteers to take part in it, just like the magnet schools." However, Fisher said later, "I know that last July I was told that the program will be mandatory."

School Candidate Larsen Accuses Fisher Of Blackmail

UNION OCT 25 197

City school board challenger Yvonne Larsen yesterday accused incumbent Julie Fisher of "outright blackmail" against School Supt. Thomas L. Goodman.

She also said Fisher is "glib, combines evasion with sheer demagoguery and is a master of the non-issue and the irrelevant."

Fisher did not answer the accusations, but continued to attack the school district administration and staff as the cause of most educational problems; explained her support last June for striking teachers, and her opposition to the city's school integration plan and windowless schools.

Fisher Accused By Larsen Of 'Outright Blackmail'

UNION, OCT 25 1977

"My opponent is a master of confusing the issue...(one who) has used the Board of Education as her play toy for the past four years," Larsen told members of the Republican Business and Professional Club during a meeting attended by both candidates.

In a prepared speech, Larsen said that both defeated candidates in the September primary - Jack DeBarrows and Barbara Brown - support her against Fisher, saying, "They agree with me that the real issue in this campaign is my opponent."

Both Fisher and Larsen repeated their respective positions for and against the actions surrounding the

four-day teacher walkout last June.

Fisher said she is opposed to strikes, but supported the teachers when they went on strike because they had been pushed to the work stoppage by an insensitive school board.

She said she still believes she was right in pressing for and securing amnesty for all the teachers who stayed on strike despite three court orders to return to schools. It was the only way the teachers could be returned to teh schools and some dangerous substitute teachers were finding their way into the classrooms.

Larsen said the strike was illegal and immoral by any standard, "And my opponent was associated with it every step of the way."

OVER STRIKE

It was in connection with the strike that Larsen made her blackmail accusation against Fisher.

Larsen said that during the strike, Fisher "...told the superintendent that if he

agreed to collaborate with the teachers union, she would see to it that he would gain such a good reputation that he could name his job anywhere in the country.

"But, if he refused, she would get him. She would accuse him of many things and publicly call for his resignation," Larsen said.

(At the time of the strike, Goodman spoke of a conversation similar to this that he said he had with Fisher in his office. Fisher later denied that she had made such threats.)

Larsen yesterday described this as "almost a form of bribery..a shameful action...and outright blackmail."

Fisher did not respond but said "The basic problem in education, here and in the nation, is that it is controlled by unfettered bureaucracies that lead to poor decisions that harm the students and the taxpayers."

SEPARATE STAFF

She said the Board of Education needs a

separate staff that can evaluate the proposals and recommendations being made by the district administration.

Fisher said she has repeatedly suggested at board meetings that the district's present testing and evaluation department, which is responsible for assessing the value and effectiveness of new or proposed programs, should be responsible to the board and not the administration.

Fisher has argued that the heads of the evaluation department will not be critical of programs suggested by district officials, because those same officials may have control over the future carreers of their critics.

She said that present board member John Witt supports her idea, and that John S. Adler, who is challenging incumbent Phil Halfaker for the District B seat, also has said he will support her idea. "Myself, Witt and Adler have agreed to remove that department from under the authority of the superintendent, so it may happen," she said yesterday.

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San Diego Unio

DIEGO, CALIFORNIA, WEDNESDAY MORNING, NOVEMBER 2, 1977

Board Pres
Fisher Elec

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ident Raps tion 'Ploy'

Schools' High Cost Disputed

By RAY KIPP

Fisher Criticized For Election Ploy

(Continued from Page B-1)

Maverick school board member Julie Fisher's claim that windowless schools will cost the district an additional $100 million over the next 25 years drew rebuttals from her fellow board members yesterday.

The Rev. George Smith, board president, and two other board members met reporters to challenge Fisher's figures and political tactics, one week away from her bid for re-election.

"That allegation is absoluitely false," said Smith who has argued the merits of "windowless" school construction with Fisher many times during her four years on the board.

Smith said Fisher's $100 million claim was based on inaccurate figures and was being used as a campaign ploy at the expense of her fellow board members.

He said her television commercials that make the claim $100 million also fail to mention the $100 million figure covers a 25-year period.

However Fisher, who attended the news conference, later defended her contention that the district will lose $100 million because of higher construction costs, larger buildings and higher interest payments over the next 25 years because of the "windowless" design now being used in city schools' construction.

"I can understand them being a little upset by my bringing it up. They made a $100 million goof," she said.

Smith and Dorothea Edmiston, who have had sharp conflicts with Fisher's views on modern school design and other education issues, said later they felt it would be better if Fisher were not re-elected to the board.

Phil Halfaker, who also attended yesterday's press conference, declined to add his views on Fisher's because he also is a candidate for re-election.

However, all three - who cast votes to build "windowless" schools- challenged Fisher's claim of a $100 million loss by not building

traditional schools with many windows.

21 SCHOOLS

Smith said the two bond issues which authorized construction of 21 new schools and career centers and a program to bring older schools up to state earthquake safety requiremenmts were approved after considerable study by school officials, teachers, parents, students and volunteers.

He said "windowless" schools - there are windows in these schools but they are small and few in number - are intended to reduce noise, cut vandalism, reduce distractions and provide balanced climatic conditions.

He conceded this type of school construction was more expensive than the traditional school design but said it is nowhere near what Fisher claimed.

COSTS TO DATE

Smith said the construction costs to date for the two bond issues total $105.7 million. (This does not include $11 million for the

University City High School or the finished costs for six of the other 20 projects still under construction. District officials have estimated that the final figure will be close to $135 million.)

"How then can this add up to $100 million extra?" Smith said yesterday.

Fisher said her figures show the total construction package will end up at $143 million and that the same number of school sites could have been built for $95 million if the traditional school design had been used.

Her $100 million estimate also includes the extra interest payments for the more expensive schools over the 25-year like of the bond issues, the higher cost per square foot and need for larger buildings, Fisher said.

However, Smith and other district officials continue to question Fisher's mathematics.

"I don't care if you put in interest and all the other junk she's talking about, it doesn't add up," Smith said.

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FISHER VS. LARSEN

Fierce Clashes Punctuate District C School Campaign

UNION NOV 3 - 1977

By MICHAEL SCOTT-BLAIR
Education Writer, The San Diego Union

The race for the District C seat on the city Board of Education has been a fierce personality clash between the two women candidates since the day they filed to run for office.

Throughout the campaign, which ends Tuesday with the general election, the attacks have become more intense and more personal. Indeed, the District C race has resulted in some of the most scathing, personal verbal assaults in any Board of Education race.

"I started out being appalled at Julie Fisher's behavior on the board, but now I know that she is a demagogue and dishonest," said

JULIE FISHER
... incumbent

YVONNE LARSEN
... challenger

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Throughout the campaign, which ends Tuesday with the general election, the attacks have become more intense and more personal. Indeed, the District C race has resulted

in some of the most scathing, personal verbal assaults in any Board of Education race.

"I started out being appalled at Julie Fisher's behavior on the board, but now I know that she is a demagogue and dishonest," said challenger Yvonne Larsen, former trustee of the California State University and Colleges.

Said incumbent Fisher, "After the rush of the campaign, I think that she (Larsen) is going to think about the terrible things she has said about me, and she will not be able to look herself in the mirror."

Not many educational issues have surfaced in the campaign.

Fisher has repeatedly said she would support the striking teachers and vote to grant them amnesty should circumstances similar to the June teacher strike arise again. Larsen

said she would never grant amnesty to teachers who ignored court orders to return to work.

Larsen says she would back the school district's integration plan to the hilt; Fisher says she would prefer to replace it with her own plan, and tells parents that the plan now being used will not work.

Both candidates speak of the importance of basic education skills, though Larsen accuses Fisher of being more interested in new, "experimental and faddish" programs, Fisher says she is only interested in new ideas that are of educational value.

The real clash has been over the interpretation of how a Board of Education should operate, especially in its relations with the school district administration.

MAJOR MISTAKE

"The board is making a major mistake in trusting the administration," said Fisher.

This has led to her proposal that the district's current testing and evaluation

department be taken out from under the control of the top school administration and made responsible directly to the Board of Education.

Fisher says that the board is receiving inaccurate and inadequate information from the administrators, and this is leading to bad board decisions.

No other board members have complained of the information they are receiveing, and, except for John Witt, they have opposed the Fisher suggestion, saying they always have access to the information they want, in the detail they request.

Fisher says that any new administrative ideas are fed through the evaluation department.

JOB CONTROL

Fisher argues that this department will not give an unfavorable evaluation to a proposal that is supported by the top administration because those same top administrators have

control over the evaluator's jobs.

Fisher suggests establishing a committee of judges, university heads, and other community leaders, which would select an independent senior staff of the evaluation department, and the evaluations would be made directly to the board.

This has been opposed by Larsen and other board members as being a way of setting up a new bureaucracy, just to serve board members, when no case has been made to discredit the value of the present recommendations from the evaluation department.

Fisher says that the city should never have built any of the new windowless schools, and if the evaluation department had been under separate control, the board would have received information showing that the windowless schools would cost millions of dollars more than traditional schools.

KEY ISSUES

This information was withheld from the

board by the top administrators, says Fisher, but other board members and the administrators say her charge is "totally untrue."

Fisher says that if her entire campaign "results in the public being educated on these two issues - the separate evaluation department and the windowless schools - then the campaign will have been successful."

But Larsen says that Fisher's facts and figures are inaccurate, and that she is "only grandstanding and offering the type of empty criticisms that she thinks people like to hear.

"We have not missed a coffee meeting or a discussion with her thoughout this campaign, and I have been appalled to hear Mrs. Fisher change her position to suit the audience," said Larsen.

"I never thought I would use the word demagogue in its real sense with regard to another human being, but that is exactly what she is - a demagogue (a person willing to use false promises, false claims, and use

popular prejudices to gain power)" Larsen said.

ETHICS QUESTIONED

"I am running against her because I believe she is totally unfit to hold public office. I resent her lack of ethics, her lack of integrity.

"She has advocated using monies to help minority causes even when she knows it would be illegal to use those monies for that particular cause. She does it just to make herself look good in front of them when she knows perfectly well that she cannot come through on the promise," said Larsen.

"This attitude and conduct belittles and degrades the voter and the taxpayer - its's disgusting." she said.

Larsen says that if Fisher "does not get her own way, then she will try to make sure nothing anyone else wants will work either. She lacks the sophistication to work on an elected body under a democratic system."

On the district's administration, Larsen

said that the board is so divided that is is not able to provide the school administrators with the guidance and leadership they should be receiving.

REAL GUIDANCE

"We are perhaps fortunate to hav a district administration that is able to run as well as it does despite the inability of the board to offer any real guidance" she said.

"The Board of Education members are trying to be a responsible government body in the community and Fisher turns it into her personal circus." said Larsen.

"Many people have a sincere fear that the educational system is failing to provide today's youth with the skills they need to survive and grow in the modern world.

"I share those fears, and I believe the board should be leading the way in building a school system that restores public faith in education. But it can't happen while Mrs.-Fisher keeps the board in meaningless turmoil,"

she said.

RATIONAL DIALOGUE

"I will restore rational dialogue to those board meetings. I have personal standards by which I live, and I will not let myself down nor the voters," Larsen said.

Asked to respond to some of the Larsen statements, Fisher said, "I'm a little taken aback when she reads some of her statements, but I get the feeling that they are not hers.

"I don't think she is very knowledgable, and she doesn't seem to be a very fast learner, so far as the educational issues are concerned. She seems to be a very pleasant person, except when she is reading her statements," said Fisher.

"As for calling me a demagogue, you can't really take those things seriously. I have been in politics for many years and I know the pressures for a new person, so I can sympathize with Mrs. Larsen."

FIRST TERM

(This is Fisher's first four-year term on the board and it is her first elected office. However, she said that she gained a lot of experience working for her late father who was in the U.S. Congress from 1956 to 1962.)

Larsen said, "When I got into this campaign, I was not certain of just what I was getting into. But now that I have seen and experienced these last two months, I am more committed than ever to being aggressive right up to the very last moment; of winning this election, and then getting our school board back to the position of public responsibility and respect that it should have.

San Diego Union

N DIEGO, CALIFORNIA, SATURDAY MORNING, NOVEMBER 5, 1977

Pupil Privacy Law Broken By Fisher, School Aide Says

Class Files Of 81 Bared, States Stern

By MICHAEL SCOTT-BLAIR

B-62

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B-4 THE SAN DIEGO UNION Saturday, November 5, 1977

Fisher Broke Privacy Law, Aide Says

Schools attorney Ralph Stern said yesterday that Board of Education member Julie Fisher violated state and federal law by making public the attendance records and grade-point averages of more than 80 Lincoln and San Diego high school students.

However, it appears that the school district also broke the law in the same way in April, 1976, when it published a report on Wright Brothers High School that included the names and grade-point averages of students.

Both acts are violations of the privacy of students, guaranteed under the 1974 Buckley Amendment to federal

law, and amendments to the California State Education Code introduced by Senator John Stull, R-Escondido, shortly afterwards, to bring the state in line with federal regulations.

HEATED EXCHANGE

The charges arose yesterday during another heated exchange in the school board election campaign between incumbent Fisher and challenger Yvonne Larsen, who is seeking to unseat Fishr in District C.

For two years Fisher has charged that during the 1973-74 school year, the school district counted 81 students in Lincoln and San Diego high schools as present when they were actually absent most of the day. As a result, she said the district illegally collected federal funds for those students.

UNENTITLED INCOME

District officers say they investigated her accusation within the district and with the County Department of Education, and found

that all attendance procedures used at that time conformed with law.

Fisher said she discovered that some city high schools used illegal methods to compute the number of students in attendance during a short period in the 1974-75 school year, and as a result the district collected more income than it was entitled to.

Fisher said that when she discovered the alleged illegalities, she spoke with senior district officers, who thereupon changed the attendance-record procedures at several schools - including Lincoln and San Diego high schools - to make them legal.

Last night Deputy Supt. Ralph Patrick, one of the officers to whom Fisher said she talked, agreed that she had discussed what she called irregularities with him.

COMMON VARIATIONS

Patrick said that a check was made and differences in procedure were found, but such differences are common in the district,

depending on whether a school is using a computer for attendance or for other reasons.

He said that a check was made of all the systems being used in the schools mentioned by Fisher, and all were found to be in full compliance with the law.

"This district collected no government funds illegally," Patrick said.

Patrick and Goodman ordered a check of the charges. Yesterday Stern said he also ordered a separate check, and both found the district procedures to be legal.

PRAISE FROM DIXON

The county was asked to do a similar check, and recently County Supt. E. Ted Dixon said that his office had found no irregularities - in fact, he said, the city school district kept one of the best attendance records in the county.

Fisher said that "Dixon changed what he was saying after he talked with city school officials."

Fisher researched the records of Lincoln and San Diego high schools and produced a list of 81 students with their attendance records and grade-point averages, all of them extremely low.

DEBATE MATERIAL

On Oct. 25, candidates for the board held a debate before members of the city school administrators' association. At that meeting, Fisher left approximately 100 packets of campaign literature on a table, along with copies of the 81 students' names, attendance records and grade-point averages.

During the meeting, she invited those attending the debate to take a copy of the material, Larsen said in a news conference.

Larsen accused Fisher of "violating state and federal law...contravening strict district policy...and jeopardizing tens of millions of dollars in federal funds" by making the names and other details available to the administrators and public.

Fisher denied any violation of the law, but agreed that she had not read the district policy recently.

'IN ANY CASE...'

"In any case, those school principals and administrators have access to all that information whenever they want it," Fisher said.

Stern and School Supt. Thomas L. Goodman said that is not true.

Under the district policy, which Stern said follows the state and federal law, a student's records are only available to the student, his or her parents, teacher, principal of the school involved, and to administrators who have business with that school.

As an example, Stern said that if Goodman was investigating the possibility of expelling a student, he could check the student's records.

NO IDLE CURIOSITY

"But if Goodman wanted to just check out

how well his next-door neighbor's kid was doing, the records would be closed to him by law," Stern said.

He said that the law closes all student records except for specific reasons and under defined circumstances.

"Mrs. Fisher's action is not covered by any of those exceptions," he said.

Asked which would be the more serious violation, release of the grade-point averages or the attendance records, Stern said: "I believe (the release of) both is an invasion of privacy under the law."

NO ACTION SEEN

Stern said the district will take no action in the matter unless a parent of one of the 81 students or a federal agency files a complaint.

He said state law does not provide for any punishment for a district or district officer who violates the law, but the federal law says if there are "flagrant violations"

then all of a district's federal financial aid can be withdrawn.

The district currently receives about $23 million a year in federal aid.

However, Stern said that he did not believe there is any chance of the federal government seeing Fisher's action as constituting a flagrant violation, and he does not believe the district's federal funds are threatened.

CONCEDES COMPLIANCE

Fisher agreed yesterday that the district's attendance procedures are in compliance with the law, and have been in compliance since the alleged inaccuracies were cited by her two years ago.

Asked why she has continued over the two-year period to bring the matter before the board, she said that she believes a full investigation should be conducted and any unentitled funds received by the city should be returned to the government.

In recent board confrontations, Fisher has

said that Goodman should be fired because he has failed to carry out this investigation, but she said last night that she no longer believes this is necessary.

"I just believe the money should be returned," Fisher said.

DISTRICT'S FACE RED

On the question of the school district making similar violations of student privacy rights in 1976, district officials - who were made aware of the apparent infraction last evening - admitted that it appears they did violate student rights, and said they are embarrassed about it.

In April, 1976, the school district made public a progress report on Wright Brothers High School.

In that report, in order to show how successful the program was, the names of students were listed, with their grade-point averages for June, 1974, and February, 1976. The figures showed that the students

had improved, but Stern agreed last night that the inclusion of those figures violated the state and federal law and the district's policy.

He said he had spoken to officials responsible for the report and they agreed that the student names and grade information should have been excluded.

"They were shocked to look back at that report and see the figures. It was definitely an unfortunate oversight," Stern said.

Diego Union

LOCAL NEWS

A, SUNDAY MORNING, NOVEMBER 6, 1977

B-73

School Board Ex-Presidents Fault Fisher

10 Issue Joint Statement Calling For Ouster Of Incumbent Trustee

By MICHAEL SCOTT-BLAIR
Education Writer, The San Diego Union

B-10 THE SAN DIEGO UNION Sunday, November 6, 1977

Ex-Board Leaders Fault Fisher

(Continued from Page B-1)

The 10 living former presidents of the city Board of Education have issued a joint statement calling for the removal of incumbent Julie Fisher from the city school board in Tuesday's elections.

Richard F. Kreile, who served on the board from 1971-75 and served as spokesman for the former presidents, said it was an "unprecedented action " in school board history, and though the 10 former presidents had "divergent political, philosophical and educational views, we are agreed that Mrs. Fisher should be removed from the board because of her disruptive and counterproductive influence

on the city's education system at a time when there is a need to improve local education and the public's confidence in it."

Kenneth Rearwin (1951-57) said the former presidents had watched Fisher's board performance with mounting concern and in June, seven of them met to consider initiating a recall election of Fisher. They decided instead to oppose her reelection, and yesterday all 10 strongly endorsed the challenger, Yvonne Larsen.

Gene French (1963-73) said that Fisher's practice of "generating explosive issues and then throwing them before the public is dangerous in a large urban school district where the very size of the district generates difficult problems for which there are no easy solutions."

Arnold O. Steele (1963-71) said that Fisher's "continued attempts to build her personal image by trying to undrmine other board members and the school administration

exemplify a wrong attitude and commitment to public life."

The other former presidents who signed the statement but were not present at yesterday's news conference were: Mildred L. Hale (who served on the board from 1929-33 and 1937-58), William P. Elser (1956-63), Dick Grihalva (1956-63), Marion F. Jessop (1958-65), R>L> "Dick" Johnston (1967-73), and Louise Dyer (1965-73). Dyer was defeated by Fisher in the 1973 election.

Kreile said yesterday, "I had the misfortune to serve on the school board with Mrs. Fisher for two years.

"I found her to be a person who first makes up her mind on an issue and then goes out to seek information in support of her position. She will listen to nothing else," he said.

He said that as a result of Fisher's conduct, "the board is an embarrassment to the public. Her by-words are conflict and chaos, and those of us who have given many

years of dedicated work to the city schools are torn to see this happen."

Rearwin said, "Her self-serving tactics of reducing everything to a public knock-down, drag-pout spectacle reduce the board to a laughing stock in the community, and that is a great disservice to the city and the schools."

French said Fisher has been "A negative influence on education in this city."

Kreile, who has served on the Democratic Central Committee and the State Water Quality Commission, added, "Mrs. Fisher is the most irresponsible public official I have ever had contact with."

He said that while he was board president, Fisher was on the board and was constantly trying to get board members to vote for her ideas in return for her vote in favor of their ideas, in what Kreile described as an effort to trade votes with other members.

DOUBT SUPPORT

French said that though the teacher union leaders support Fisher he does not believe that she has support among the 5,000 teachers.

"I talk to many teachers," said French, who is now on the Board of Trustees of the San Diego Community College District "and I find that many times Mrs. Fisher has been an embarrassment to them."

In supporting Larsen, Steele said she would be a "calming influence on the board at a time when the lack of public confidence in education has reached the crisis level.

"Mrs. Fisher behaves like a firebrand in a dry and tinder-laden situation," Steele said.

Rearwin said he believed Larsen could help the board and teachers work to correct some of the city's educational problems, while Kreile and French endorsed his view.

Kreile said that the carefully-worded endorsement of Larsen was checked over by all the presidents who signed and had the

full approval of them all.

UNITY NOTED

The endorsement said that the signers were "taking the unprecedented action in view of our united concern over the future of public education in our community.

"We are urging all qualified voters to vote for Mrs. Yvonne Larsen for Board of Education, and unseat the incumbent, Mrs. Fisher," the statement said.

Larsen said she knew nothing of the action by the former presidents until they came to her with the endorsement.

She said, "It makes me even more challenged and committed to make a clear statement to San Diego that I will work to make quality education available to all students."

Uplavici Syndrome Strikes Again . .

ALFRED JaCOBY

The word game is a fascinating business. Words constantly take on new meanings. Misused words become common terms. The dictionary is no longer supreme in this world.

The other day, I found a wonderful phrase that fits the situation: the Uplavici Syndrone.

About 90 years ago, according to a recent bulletin of the American College of Surgeons, a research paper titled "on Dysentery" was published by Dr. Jaroslav Hlava in Prague in the Czech language. Dr. Hlava's work was soon abstracted in a German bibliography. In the translating process, however, the byline was dropped and the

research paper's title substituted for the author's name.

Thus: "O. Uplavici" ("On Dysentery," in Czech) became the author of what was to be an oft-quoted work on dysentery.

Thus: The Uplavici Syndrome...an inadvertent error which is repeated and repeated until becomes fact.

It's the power of the written word. If someone tells you something - its a rumor. If that rumor gets printed in a newspaper or magazine - it becomes fact.

The paragraph above, for example, may prove my point. If I told you about Uplavici's Syndrome, would you believe the story? Now that you've read about it, don't you? (I certainly believed it - when I read about it.)

Newspapers suffer from Uplavici Syndrome from time to time. A "fact" is reported incorrectly in a news story. Then it's filed as a "fact" in our Library. That same "fact" becomes a Fact five years later when

another reporter uses the original story as a reference.

"Never trust the clips," a good reporter soon learns. "Always check the facts, regardless of their origin."

Uplavici's Syndrome was called to my attention by Dr. Richard D. Perlman, who referred, in turn, to wide-spread editorial comment which repeats the oft-heard statement that General Motors spends more for health insurance than for steel.

The truth is, a spokesman for General Motors contends, there are thousands of steel suppliers, none of which receives as much from GM as GM spends for health insurance.

All together, however, GM is quoted as saying, it spends far more for steel than for health insurance.

My favorite example of a local Uplavici Syndrome would be the legend of the Duke and Duchess of Windsor and Hotel del Coronado. If one is willing to believe a long-lived

story, the duchess (then a Navy-wife living here) met the duke in 1933, when he visited Coronado.

In fact, some firmly believe, they met at a banquet at the Hotel del Coronado.

It's a wonderful story. It's also false, an Uplavici - as attested by the memoirs of both the duke and duchess.

Another example of Uplavici's Syndrome was printed recently in The San Diego Union in a postprimary analysis story of the voting in the school board election. The story, written by one of The Union's most-accurate reporters, said that Incumbent Julie Fisher had marched with the school teachers in their recent strike. Through an error in the page-layout process, the fact that the story was an analysis was dropped from the story's headline.

The allegation of the marching with the teachers has been challenged by at least one reader. Fisher herself denies it.

The reporter says the incident occurred on the day the strike ended, a Thursday, when an estimated 1,500 to 2,000 teachers picketed the Education Center. The reporter recalls walking out of the building and seeing Fisher in the throng of teachers.

According to Fisher, "I walked from my parking place, where all the trustees park, to the Ed Center door. There were lots of pickets in the area and I spoke to some of them. I was stopped once because of the TV cameras and the reporters. But I wasn't marching with the teachers. I walked the same distance that all the trustees did to get to the door.

Two other reproters on the scene, looking back through the haze of three and a half months, confirm Fisher's story - that she was walking from her car to a meeting and not marching with pickets.

The Union's news stories on that day's events show no indication that Fisher was

walking with the strikers, either. That she was supported by the strikers and that she generally has indicated sympathy with their cause isn't in dispute.

What is disputed is one sentence in one story.

The only conclusion that can be drawn by the Reader's Representative is that The Union was inaccurate in saying that Fisher marched with the teachers in the strike. Another conclusion is that The Union was sloppy in presenting an analysis story without identification so that is appeared to be a news story.

Why correct it now, three and a half months after the strike and nearly a month after the story ran?

Because we believe it's better to set the record straight now - with a school board race in progress - rather than add another example to the saga of Uplavici's Syndrome.

School Vote Coverage — Careless

ALFRED JaCOBY

Is it possible for a newspaper to be committed to fair and unbiased reporting and yet appear for a full week as though it were devoted to the defeat of a particular candidate?

Cannot carelessness in the coverage and display of news be truly as bad as news deliberately slanted?

The answer to both questions is "yes," and the performance of The San Diego Union during the week preceding last Tuesday's school board election is proof of the case.

Specifically, in the Julie Fisher Yvonne Larsen school board contest, The Union's stories were, at times, unfairly reported; The

Union's headlines were often unfairly damning toward Fisher; and The Union's placement of stories seemed designed to create an anti--Fisher mood which may or may not have existed.

Despite all this, it's the opinion of this reader - after considerable checking with the writers and editors responsible - that all the above was not the result of a direct conspiracy or design. Rather, I'm convinced that something far worse must take the blame; Carelessness.

Cynics in the news business say they prefer deliberate slant to carelessnes. After all, the reasoning goes, there is a certain professionalism in doing a job well, regardless of the job.

Perhaps so. I would like to think that The Union has progressed to the point where we may be careless - but at least we aren't deliberate in being unfair.

And I would also like to think that the next step would be to eliminate the careless-

ness...a step I am convinced is both needed and desired.

But as far as the school board coverage is concerned, it WAS a sloppy, careless job and needs a public review. So let's go back to the week before the city and school board election.

The only real conflict seemed to be in the School District C, where Julie Fisher, the incumbent, was matched against Yvonne Larsen. It would not be unfair to say that Fisher represented an anti-Establishment, anti-Administration point of view and that Larsen was both pro-Establishment and pro-Administration.

With this setting, The Union's obligation was especially significant - to report and present an unbiased view of the last-minute campaign.

Here's how we did, in the view of this observer, who, out of town during the week, saw the papers only afterward with no in-house

or outside preconceptions.

Both Tuesday and Wednesday morning's papers featured front page stories on the local news section page that typified a reporting technique long considered unfair: If an opponent makes an accusation, feature the attack in the lead and headline of the story while putting the rebuttal well down in the same story.

I'm not saying this was a deliberate action in this case. News stories need to be interesteing: attacks and conflict are, per se, interesting - so it's always easier to lead with the attack.

But that technique doesn't make for balance, something greatly desired in political stories. The easiest way to measure the effect of the story is to see what the copyreader produces as a headline.

On Tuesday morning, the headline was "School Candidate Larsen Accuses Fisher Of Blackmail." The story was about a meeting at

which BOTH candidates spoke.

On Wednesday morning, the headline was "Board President Raps Fisher Election 'Ploy'." Again, Fisher attended the news conference at which the charges were made. Again, the headline reported the attack on Fisher. (The quotation marks around 'ploy' were meant to imply the word was not ours, but, rather those of the person being quoted. Unfortunately, the quotation marks were left off on the headline for the continuation of the story, on an inside page, thus adding to the implication The Union was injecting editorial opinion to the news.

Saturday morning's story had to do with a dispute over disclosure of students' personal records. In essence, the story said that both Fisher and the school district apparently had broken the law regarding privacy of school records.

But the story itself was written with the lead - the first paragrph that is supposed

to summarize its contents - aimed at Fisher's apparent violations. The second paragraph was devoted to the school district's apparent violations.

Further, the story was structured so that the third through 35th paragraphs were devoted to the background of Fisher's part in the story. Only in the 36th paragraph does the story return to the school district.

There are lots of ways to write every story, as every reporter and editor knows. The important thing is that the story present information in an even-handed way. The idea is that the reader comprehend the facts in the same manner as the writer and editors.

In this case, even the headline writer was confused. The headlines read: "Pupil Privacy Law Broken By Fisher, School Aide Says."

As a number of readers have pointed out, both Fisher AND the district were implicated and both should have been mentioned in the headline.

On the Sunday morning before the election, the front page of the Local News section featured a report that the 10 living former presidents of the San Diego school board were opposing Fisher: The story came out of a Saturday press conference - but was based on a statement issued three days before, on Wednesday. There was no comment nor answer from Fisher.

And, as a matter of fact, the statement was carried in a political advertisement in the Evening Tribune Saturday morning before the press conference (and was scheduled and carried as an ad in Sunday morning's Union).

The editors and reporters involved knew of the pending story on Friday but chose to hold it until the Sunday paper on the promise it would be an exclusive. Yet, on Wednesday, the political ad had been submitted for use in Saturday's Tribune and Sunday's Union.

Clearly, the Union's editors were had - by a political campaign ploy.

The Union's rule for political stories - and especially last-minute attacks - is that the other side must be given a chance to answer.

Why wasn't Fisher contacted?

Again, the answer seems to be a combination of slip-shod execution by reporters and careless direction by editors.

The story itself wasn't really worth the heavy display it received, in my opinion. The editors in charge felt differently and chose the Fisher story to lead the page. Their supervisors, who should have known better, busy with weekend activities, didn't object, although the question of giving Fisher a chance to comment, was raised.

The answer was that Fisher was to be contacted after 6 p.m. so that what was considered to be an exclusive story would not be lost. But that "exclusive" had already been lost by publication of the ad that day. Was Fisher called? She says

she was at home all evening and heard from no one. Members of the night side staff at The Union say they didn't know they were supposed to call her. Day side staffers aren't sure the word was passed to make the call.

No one, meanwhile, on the other desks which have the responsibility for carrying out the general rules for fairness challenged the story as it stood.

And no one, on Sunday, followed through in a belated attempt to contact Fisher to get, at least, a comment.

Ironically, a story on Page 1 of the same Sunday morning paper reported that The San Diego Union Poll showed Fisher with a substantial lead.

The statistics for that Poll had been gathered the previous weekend - before the blitz of negative stories during the campaign's final week. That the stories had an effect is certain: Fisher, shown leading

in The Union Poll a week before the election, was defeated decisively last Tuesday.

Again, could all these bumbling non-actions and nonprofessional operations truly be just as I've concluded: Carelessness? Was there truly no concentrated campaign against Fisher, a candidate against whom The Union had editorialized?

My answer is still - "yes."

Why? Pure instinct, for one. The reporters and editors involved in all this, shown the overall picture, generally acknowledge they should have been aware at the time of the culminative effect built up over the week.

And, finally, there is a general feeling among staff members and editors that not only was The Union's performance shabby - but that it must improve to avoid a repeat in the future.

Permit me, please, a bit of philosophy: a newspaper is a lot like life itself: You go forward three giant steps and hope to slide

back only two. The Union has gone forward a lot in recent years.

The Reader's Representative must be both a pessimist and an optimist. He reflects, I hope, the readers of this newspaper.

TEXT OF SPEECH READ BY YVONNE LARSEN

OCTOBER 24, 1977

Ladies and Gentlemen:

Several months ago, after devoting many years to my family and serving in various capacities as a community volunteer, I made the decision to run for the San Diego School Board.

As you will recall, we had just gone through a wrenching and unlawful strike goaded on by many of the school teachers in the district by the teachers' union leadership.

And we all read with horror the accounts of my opponent's irresponsibility as a member of the school board. We watched her as she leveled a series of scurrilous charges against the superintendent of schools. This sorry chapter in the history of our schools was nothing less than blackmail.

She told the superintendent that if he agreed to collaborate with the teachers

union, she would see to it that he would gain such a good reputation that he could name his job anywhere in the country.

But, if her refused, she would get him. She would accuse him of many things and publicly call for his resignation.

The superintendent refused to go along with what was almost a form of bribery.

Frankly, I hold no brief, either for or against the superintendent. He was fully able to defend himself against the false and vicious charges he was threatened with.

But outright blackmail is not a quality I take too lightly.

It was this shameful action by my opponent which presaged the illegal strike hatched by the teachers' union leadership in the waning weeks of the spring semester.

The judge whose responsibility it was to decide on the matter called the strike -- and these are his words -- "a shameful blot on the history of the teaching profession in San

Diego."

Judge Lazar said "the strike was instituted to use its disruptive effect for the school process and the children.

"The only persons directly affected by the strike were the children who, in blunt language, were exploited as hostages, for the purpose of a political power play." the judge said.

The strike -- by any standard -- was illegal. In my opinion, it also was immoral. And my opponent was associated with it every step of the way.

Unfortunately for everyone -- and especially for our children, the students -- it came at the worst possible time. For many parents, it was a disquieting event, to say the least. For the teaching profession...especially the public's perception of the profession-...it was a net minus, a step backward.

And, the thousands of teachers who refused to leave their classromms to violate a court

order...the teachers who stayed with their students despite the intense pressures of the teachers' union leadership to break the law...wrongfully suffered from the understandable backlash of the community.

As if the strike were not enough, my opponent then voted to reward open disobedience of the court order to end the strike. She voted to reward the striking teachers with amnesty.

Her vote, coming as it did from one who earlier sought to blackmail the school superintendent, should not have been surprising.

But, still I was shocked.

How could a member of the San Diego School Board -- a person who is sworn to obey the law and set a good example for our children -- so condone the illegal activities spurred on by the teachers' union that she would actually vote to reward these unlawful activities with amnesty?

I remembered the words of the judge: "The

children were exploited as hostages...for the purposes of a political power play."

Certainly, that sort of cynical behaviour spurred on by the teachers' union leadership is not deserving of amnesty.

It was on the basis of my opponent's shoddy, unprofessional, divisive and irresponsible performance..and failure to meet the obligations of the public trust vested in her as a member of the San Diego School Board that I made my decision at the last moment...to enter the race.

I believed the people wanted a change. Everything I have learned since then about my opponent's shocking failure to perform her duties has justified that belief.

In my opinion, this is one of the most important races in this elecion. What happens on November 8 will determine for years in the the future the kind of school system our children will experience.

Even more important...it will determine in

significant measure...the kind of future our students can look forward to.

Are our schools to be run by the teachers' union leadership? Or will they be run by the citizenry...the taxpayers...the parents and grandparents of our children?

We already have had many hints as to how the people feel. In the September 20th primary election, more than 60 percent of the votes cast in District C, were against my opponent. I, myself, received just a few hundred votes less than Julie Fisher.

This was an unexpected and certainly amazing number, given the fact that my campaign only got off the ground a matter of weeks earlier. In fact I and my fellow candidates who opposed the incumbent in the District C race literally had to come from nowhere.

Still, my opponent failed to carry her own district -- a sad commentary on the way people of her own district perceive her performance.

You'll be interested to know that the two other candidates in District C who ran against her strongly support my candidacy. They are Jack DeBarrows and Barbara Brown.

The agree with me that the real issue in this campaign is my opponent.

She serves as an ever present tool to be used at will by the teachers' union leadership. She has used the board of education as her playtoy for nearly four years.

Listen to the San Diego Union. The newspaper last month said she "has been a solitary and disruptive force on the board during her one term."

The Union pointed out that Julie Fisher was the sole vote on the board of education against a plan for voluntary integration drawn up by the Citizens' Advisory Committee for Racial Integration. This voluntary plan, which she voted against, was one which was laboriously developed by her colleagues, by the school administration and by a citizens'

advisory commission.

During the process of drawing up that voluntary approach to integration, she violated her public trust by passing on confidential, privileged information to the plaintiffs in the Carlin Case. Superior Judge Welsh characterized her irresponsible actions as those of a "turncoat" and a "renegade."

To this day, we do not know what her position is on integration other than the fact that she voted against the voluntary plan I outlined earlier. And this is not surprising, because my opponent is a master of obfuscation, of confusion.

Let's try to cut through just a bit of that obfuscation for a moment.

She has suggested that her idea -- certainly not a plan -- would be to somehow institute a program of year-round schools. Precisely how this might bring about voluntary integration is a riddle at best.

Perhaps the best indicator of her sentiments was stated by her a few days ago. She said her plan would make Lincoln High School (now about 95 percent black) 60 percent white and 40 percent black. This is what she said, regarding Lincoln High School.

I want you -- the members of this audience -- to ask my opponent during the question and answer session after the debate how she would bring about her desegregation plan. Unlike you I have seen and heard my opponent in many forums recently.

She is the master politician. She deliberately leaves most questions unanswered. She also combines evasion with sheer demagoguery. That is to say, no one knows what it really was that she said, but because it's simplistic it somehow sounds good.

Further, she has a different message for every group...depending on the group and what she thinks it wants to hear.

Now, these tricks have been used by crass

politicians for a long time.

The fact is my opponent continues to shy away from the educational issues in this race. She doesn't want to talk about them. It may well be that she is shaky and unsure on the issues. I suspect it's really because her stands on the educational issues are unpopular enough that she simply doesn't want to speak freely about them.

Like, for example, amnesty for those teachers who walked out of classes...and left many thousands of kids to flounder.

Speaking of the teachers' union strike, I want to make it clear that two thousand of the city's teachers had the courage not to succumb to the pressure of the strikers.

Yet, my opponent, slapped in the face those teachers who stayed on the job and obeyed the law by rewarding those who broke the law and defied our courts.

I urge you in this audience to ask my opponent how she can be in favor of rewarding

lawbreakers. Please ask how, as a member of the school board, she was able to give aid and comfort to the same teachers' union which chose to break the law and contemptuously ignore the order of a court of law.

Ask her how she can justify being a tool of a special interest group, the San Diego Teachers Association -- and expect to serve the interests of the community at large, including taxpayers and parents.

Ask her why she brings continual disruption to our school board.

Ask her why she votes against the majority of the school board on so many issues.

There are other questions. Many questions. Ask her about them. Examine the way in which she responds..if she responds at all.

As I told you before, I have never run for political office. Oh, I was elected student body president at Hoover High, and I've had a number of leadership responsibilities in the community. I've been a member of the board

of trustees of the State Universities and Colleges and I serve on the Advisory Board to San Diego State University. But, I've never run for political office.

I'm not a politician...the kind of person who wants to make it a career. Perhaps this race would be easier for me if I were. I am a woman--wife, mother, citizen -- who thinks something can be done to improve the quality of education for our children.

After all, our children are the only real future we have.

I know politics can be dirty. Campaigning is hard.

Campaigns are not always won on the issues. That is a political fact of life, albeit a sad one.

I want this campaign to be won on the issues. The Board of Education is simply too important to the life of our community and the educational needs of our children to be represented by cynical political reality.

Early in this campaign, I determined that I would not let personalities intrude. I would carry my beliefs forward, try and make them heard -- and understood -- so the voters could decide who would best represent the interests of our children.

As I've already indicated, my opponent has chosen not to do that. She is the master of the non-issue. The irrelevency. The red-herring. She is glib and slick at it. That's because she is truly a politician.

Understandably, she wants money for her campaign. She protests that she can't raise it. If we are to believe her, few want to contribute. If that's true -- because she indicates she's having a problem --then you can draw you own conclusions as to why.

But, like a true politician, my opponent continues to try to turn an embarrassing and telling negative around, and make political hay with it.

She wants the issue to be that Yvonne Larsen

has financial support.

Yes. People from every corner of the community have seen fit to donate to my cause...because they are hoping for new reason to be injected into the Board of Education. They're appalled by my opponents' performance -- the disruption, the irresponsibility, the sham she represents.

They want what all of us as parents, taxpayers and citizens deserve. They want a better chance for our kids. A chance for the future in a society where the three "rs" are too often joined by a 4th today -- "Remedial"

They are fed up with the notion that laws are applicable only to those without political clout. That laws can be broken by those who have political friends on the school board.

I say it's time we get on with what this campaign is really all about. Not cheap politics, not obfuscation of the real issues, not the demagoguery of the politician, but educational issues that relate specifically

to what we want for our children.

Again, I urge all of you in this audience to listen carefully to what my opponent has to say and to measure her on the way she addresses the real issues...the educational issues.-..cf this campaign.

YVONNE LARSEN CAMPAIGN COMMITTEE

NEWS RELEASE

NOVEMBER 4, 1977

San Diego School Board Candidate Yvonne Larsen today charged her opponent, the incumbent Julie Fisher, with breaking state and federal laws by "invading the privacy of dozens of students in direct violation of San Diego School District policies and thereby jeopardizing tens of millions of dollars in federal funds to local schools."

Mrs. Larsen accused her opponent of actually making public the names and grade point averages of 81 students at a recent meeeting held for candidates in two school district races.

"Julie Fisher has demonstrated for all to see that she will even infringe on a student's lawfully protected right of privacy in order to try to win the election," Mrs. Larsen said.

"Five months ago Julie Fisher rewarded open disobedience of the law and a court

order, by striking teachers union members, with amnesty.

"Now, my opponent has broken the law herself," Mrs. Larsen said.

The challenger said Title 20, Section 1232G of the U.S. Code says "no funds shall be made available...to any educational agency or institution which has a policy or practice of permitting the release of education records...of students without the written consent of their parents to any individual, agency or organization" (other than to school officials who are specifically deemed to need them).

Mrs. Larsen explained that it is the policy of the San Diego School District to strictly confine such grade point information to the student, his parents, his teacher and the teacher's immediate supervisor or the principal of the school. The School District policy forbids the sharing of such information with the principal of another school except

in the case of a student transfer.

Furthermore, Mrs. Larsen said, California Law (Education Code Sections 10944, 10947 and 10932) makes it clear that a student's grade point average cannot be given out, in violation of school district policy and practice, without the expressed consent of the parent(s).

Mrs. Larsen pointed out that the meeting, where as many as 100 packets containing the handwritten (by Mrs. Fisher) lists of individual students and their grade point averages were made available to members of the audience, was held at Taft Junior High School the morning of October 25. The meeting was moderated by San Diego Radio Personality Fred Lewis and the audience was composed largely of school principals and administrators, as well as the candidates and members of the press, according to Mrs. Larsen who also was in attendance but did not pick up the materials distributed by Mrs. Fisher.

"It was only yesterday that I received copies of the materials and, on consultation with legal counsel, confirmed suspicions that they were distributed in violation of the law," Mrs. Larsen said.

"Not only are these laws clearcut, they are very well known. Publicity surrounding tyhe passage of this legislation was widespread and the subject of front page newspaper stories across the country (when Senator Buckley's amendment, called the Federal Family Education Rights and Privacy Act was passed two years ago).

"Julie Fisher has been in the school board for four years. Either she had to be aware of this serious, protective civil liberties legislation affecting all schools receiving ppublic funds or she doesn't know as much about her responsibilities as she claims she does. Either she flouted the law and infringed on the privacy of the students or she is simply inept," Mrs. Larsen saii.

"If I were a parent of one of the children whose grade point average was disseminated for all to see I would be shocked and angry," Mrs. Larsen added.

It has become more apparent daily that Mrs. Fisher will go to any lengths to gain election without regard to accepted ethical standards or the legal constraints of the law. However, to violate the privacy of 81 students and subject many of them and their parents to possible embarrassment along the way -- just to try to win an election -- is the height of irresponsibility, especially for a school board member," Mrs. Larsen said.

"Mrs. Fisher is the same public official who has refused to take off the air a television campaign commercial which the President of the San Diego Board of Education and other school district officials have branded as "inaccurate, irresponsible and unworthy of a board member."

"Furthermore, Julie Fisher's collaboration

last Spring with the striking teachers -- who defied the law and a judge's order -- was, in my opinion, a direct violation of her oath of office to uphold the law. It is high time this cynical disregard for the law and bizarre conduct is brought to a halt," Mrs. Larsen said.

SUMMARY OF THE EVIDENCE OF TRUTH/FALSITY

This summary includes the argument from the Larsen Respondents' Brief and all of the testimoony cited in that brief pertaining to the 'charges'.

The jury was instructed to answer the questions listed in the Special Verdict (A-83). The Special Verdict was divided into three sets of issues, one for each of the contested publications. Each set began with an initial question asking if the statement was true. It included a statement that the burden of proving the truth of the statement was on the defendants.

> The defendants have the burden of proof as to issue numbers 1, 15, and 29; the plaintiff has the burden of proof as to all other issues.

One of the jury instructions read to the jury stated that if the weight of the evidence seemed evenly divided then the decision must be against the party having the burden of proof. The first set began,

"Issue No. 1: Was the following statement made by Yvonne Larsen, W. Daniel Larsen, and Joseph Harmon substantially true: "Do taxpayers like it when Julie Fisher appears at union rallies and supports their demands?"

"If you have answered Issue No. 1 'yes', then skip Issues Nos. 2 through 14 and answer Issue No. 15. "If you have answered Issue No. 1 'no', then answer the next six issues."

The instructions included in the Special Verdict dictated that if members of the jury answered the first question of any set in the affirmative then they were to skip the questions concerning knowledge of falsity or reckless disregard for the truth. Since the jury answered all of the initial questions in the affirmative, the questions pertaining to actual malice were not considered.

<u>The evidence does not support an affirmative answer to question no. 1</u>.

Fisher contended that 'union rallies', as the term pertained to the 1977 San Diego Unified School District teachers' strike, was understood to mean the Balboa Park rallies that

were shown nightly on TV during the strike. She noted that television reports of the Balboa Park rallies, included San Diego Teacher's Association president Hugh Boyle's speech urging the teachers to defy a court order and that they were repeated a few weeks after the strike as part of the news coverage of Judge Levitt's contempt citation against Boyle. Television clips shown to the jury (exhibit 28) include scenes of the Balboa Park rallies and statements of Hugh Boyle urging the teachers to defy the court order, saying "Judges don't make law..."

Plaintiff testified that, while walking a precinct in Mission Hills, on the day the article (B-1) was published, she met with strong negative reactions to the "rallies" statement. She was greeted with comments such as, "You were up there with Hugh Boyle urging the teachers to defy the court order" indicating that the statement was understood to mean that Fisher attended the Balboa Park

rallies which were shown on TV during and after the strike.

Defendants did not contend that Fisher attended the Balboa Park rallies, and they did not introduce testimony or other evidence which showed that anyone understood the rallies statement as conveying another meaning.

Each defendant cited the Union newspaper picture (exhibit 10), taken of Fisher as she entered the Education center to attend a Board of Education meeting, as the basis for the statement. Mr. Larsen noted that the picture appeared on the same page as pictures of the Balboa Park rally.

All witnesses agreed that Fisher and other Board of Education members walked through a group of picketing teachers while going from their cars to a Board of Education meeting on June 9, 1977, the last day of the teachers' strike.

The TV clip showed board members Edmiston,

Halfaker, Smith and Fisher entering the Education Center building as the narrator said "One by one they arrived." It showed Smith stop and say "Listen, to ask for amnesty when you know you have a cause is cowardice.....", and cheers, "Julie, Julie, Julie" were heard as Fisher walked in.

The evidence does not support a yes answer to question number 15. The 15th question of the Special Verdict reads as follows:

> "Issue No. 15: Was the following statement by Yvonne Larsen, W. Daniel Larsen and Edwin Gray substantially true:
>
> "We watched her as she leveled a series of scurrilous charges against the superintendent of schools. This sorry chapter in the history of our schools was nothing less than blackmail."
>
> "She told the superintendent that if he agreed to collaborate with the teachers union, she would see to it that he would gain such a good reputation that he could name his job anywhere in the country."
>
> "But, if he refused, she would get him. She would accuse him of many things and publicly call for his resignation."

"The superintendent refused to go along with what was almost a form of bribery."

"Frankly, I hold no brief, either for or against the superintendent. He was fully able to defend himself against the false and vicious charges he was threatened with."

"But outright blackmail is not a quality I take too lightly."

"The strike -- by any standard -- was illegal. In my opinion, it also was immoral. And my opponent was associated with it every step of the way."

"Her vote, coming as it did from one who earlier sought to blackmail the school superintendent, should not have been surprising."

"...she violated her public trust by passing on confidential, privileged information to the plaintiffs in the Carlin case. Superior Judge Welsh characterized her irresponsible actions as those of a "turncoat" and a "renegade."

This statement is composed of at least five conjunctively related parts: 1. The 'charges' were scurrilous, false and vicious, 2. Fisher attempted to 'bribe ' the superintendent with job offers; 3. She attempted to

'blackmail' him; 4. She supported the teachers illegal strike; 5. She passed on confidential privileged infomation.

For this 'statement' to be true, all parts must be true. Defendants did not provide any evidence to prove 1, 2, 4 or 5. As to 3, there were discrepancies in the testimony, but insufficient evidence to prove that the statement was true.

1. CHARGES

The testimony agreed that the 'charges' were contained in a statement Fisher made at the end of the tape recorded June 7, 1977 Board of Education meeting. She read a transcript of the statement,

> This is -- this -- these are the things that I said at the end of that meeting.
>
> "In 1975 at the request of teachers I investigated student attendance records. I found that the District had submitted for income purposes false attendance records. The District collected funds for students who were not even enrolled in a minimum number of courses. I brought this to the attention of the superintendent and the board in

executive session. The superintendent steadfastly refused even to investigate the violations. The violations continued until I went to the county superintendent -- to the County Superintendent Ted Dixon. And after discussing it with him -- after discussing it with him, the procedure was changed and the violations attended to."

"They're other violations of District policy. The superintendent just during this last year admitted to misappropriating a half million dollars of district funds. Its's not a violation of law but it is a violation of District policy."

"There have been many violations of district policies in personnel matters. Just recently an administrator was transferred and the action of the board was hidden from the board. The transfer -- the board voted on the transfer without knowing it. The transfer was put in with personnel -- with the personnel action forms."

"A few years ago we had a grievance based on the transfer and demotion of Thelma Johnson. This went to arbitration. The arbitrator severely criticized the district for violating its own policies. Dr. Goodman got the issue through the board -- he pleaded with the board; he said, "Are you going to support me or the Teachers' Association?" We didn't even discuss the issues. The Board overturned the arbitrator's decision."

"I think with that background that

it's entirely justified for the teachers to ask if we have an agreement, if we have a contract -- if we have a dispute over the interpretation of the agreement that we be able to call into the situation a third party. And that's what binding arbitration of grievances amounts to."

"The teachers on Sunday -- over the weekend on Saturday and Sunday I contacted the teachers' officials and asked if we couldn't avert the strike. We came up with some very reasonable proposals. They said they will avert the strike and consider as reasonable progress, keeping evaluation and assignment the way it is now and the way it was in 1974 and '75. We offered a five percent salary increase and a one and a half million dollar -- and one and a half million dollars committed to class size on a contingency basis, that is only if we get the money -- that they would consider that adequate and refrain from striking. And also, the other condition is that we have -- that they have the right to call in a third party to interpret the contract if there is a dispute, and they would agree to a no strike clause in exchange for that. That's binding arbitration of grievances in exchange for a no strike clause."

"If we had put this up to a vote of the public, I think we would have gotten a 90 percent approval, but the the public would be in favor of this. The public wants the teachers to be treated fairly,

and the public does not support paying $52,000. to a superintendent who violates the rules and the law."

"I think -- I don't approve of the strike. I think that teachers, what the teachers should be doing -- that they should be communicating to citizens these violations I've discussed and many others. And I think if the public realized what was going on they would strongly -- they would put strong pressure on the board and stop -- on the board to stop rubber-stamping the superintendent and make progress -- to take a reasonable position at the negotiating table" (R.T. 730, l. 13 - 733, l. 11)

No evidence was offered to show that any of the four charges was false. Defendants witnesses stated, "They were investigated and proven false", and defendants referred to investigations 'that proved them false', but they did not provide any specific evidence to show that any of the charges were false and they did not refute Plaintiff's evidence of their truth.

The first,

"In 1975 at the request of teachers I investigated student attendance records. I found that the District had submitted for income purposes

> false attendance records. The District collected funds for students who were not even enrolled in a minuimum number of courses. I brought this to the attention of the superintendent and the Board in executive session. The superintendent steadfastly refused even to investigate the violations. The violations continued until I went to the County Superintendent Ted Dixon. And after discussing it with him, after discussing it with him, the procedure was changed and the violations attended to."

Fisher testified that she brought the document (exhibit 7, E-1) into executive session, told the superintendent and the Board that the figures showed that the district had to be collecting funds illegally and that the superintendent refused to investigate. There was no contradictoy testimony.

The result of the computation is that if each of the 83 students, whose names appear in exhibit 7, had attended every school day they could only have generated 35.5 A.D.A., and for just these students, 47 absences should have been reported every day. Thus

the minimum number of unexcused absences reported for the 7th month, which had 15 school days would have been 47 x 15 = 705, rather than the 511 that was registered on the first page of exhibit 7.

Dr. Patrick's testimony was consistent with Fisher's. He testified that he heard of some communication from Dixon and was subsequently directed to look into the problem of attendance accounting for students enrolled in fewer than four classes. During his testimony he went through the exhibits to his deposition and identified the process for changing the attendance manual that was used by District attendance clerks. His testimony supports Fisher's contention that the '74-'75 manual allowed for illegal collection of funds. He interpreted the first page of exhibit 7 that lists the total number of unexcused absences for each school month, and he went through the 'exercise' with the data on the handwritten lists.

Some of the pertinent testimony of Dr.-

Patrick is as follows,

> Q. First of all -- First, I'd like to quote from your deposition, and this is what we're getting at. The question was, on page 127, line -- let me see. Page 127 -- okay. 116, line 22:
> "Did you ever state to anyone that Mrs. Fisher's allegation that some of the schools in the district were collecting full A.D.A. allotments for state -- from the state for students who were less than full-time students was false? And the answer:
> "I do not recall making that statement." (R.T. 919, l. 3 - 17)
>
> Q. Okay. Well, would you -- could you explain the change pertaining to students enrolled in fewer than four classes that was made in the attendance manual between the 1974-75 and the 1975-76 year?
>
> A. .....During 1974-75, several schools developed a partial attendance reporting system with our pupil accounting department, and that would be to say that knowing these students were attending two periods a day, approximately 120 minutes, this information was made known to the pupil attendance department. Then an adjustment was made in their, what we call, 'average daily attendance.' Instead of it being 240 minutes, it would be 50 percent of that. That was done, though, only in specific school situations,

such as -- I recall Madison High School, in particular, in a sense developed, if not pioneered, the process with Pupil Accounting to accomplish this.

"There was no specific provision that I could find in the Education Code or in the Administrative Code, Title V, issued by the California State Department, which gave us direction at this point as to how to accommodate less that full-time or 240-minute class programs for students. That was the basis for instituting in our attendance manual for 1975-76 a specific procedure wherein any student who attended less than the 240 minutes would be specifically recorded in all schools and reported on a monthly basis to the Pupil Accounting Department.

Q. Okay. Now, you referred to Madison's reporting of a student who was attending two classes as attending 120 minutes and being 50 percent of an A.D.A., right?

A. That's correct.

Q. An average daily attendance. Well, that -- that implied when they reported as 50 percent -- that meant that there was 50 percent of the income that you would receive for a full-time student; isn't that correct?

A. For that school day; that is correct. (R.T. 919, l. 18 - 21; 920, l. 24 - 921, l. 27)

Q. Okay. Then, would it be fair to say that the change from the '74-'75 attendance accounting procedure for the entire district instituted a process or a procedure for positive attendance reporting for students who had less than four hours?

A. That's right. It was incorporated in the attendance manual for our schools.

Q. It hadn't been in the attendance manual before?

A. That's correct. (R.T. 923, l. 24 - 924, l. 4)

Q. Okay. Well, what I'm just trying to get at is the way Madison High School was doing, they -- if the student -- if you had a student who was taking two classes and that student attended every day, then that student would generate half and A.D.A., right?

A. That is an accurate computational statement. (R.T. 927, l. 16 - 21)

Q. Okay. Now, if somebody took data on students from another school in the same -- same manner; if they took a -- a -- one student or the number -- say, a list of students and they added who were taking less than four classes and they did as we just went -- you know, the same procedures we're just talking about. Just assume that they were attending all of their classes every day. If they

added the number of classes they were enrolled in and divided by four, isn't it true you would again get the maximum A.D.A. that could be counted for those students?

A. Yes. That would be a basis for determining that. (R.T. 928, l. 18 - 28)

Q. (Referring to exhibit 7) Can you recall that this is something that we discussed?

A. Yes. I recall. (R.T. 924, l. 20 - 22)

Q. Okay. Now, would you look at the thing (referring to exhibit 7) -- Let's just go through what it -- what it is before we talk about, you know, where it's been or who saw it. Now, on the very first page by 'San Diego High School,' you see where there's some handwritten numbers in there?

A. Yes.

Q. Say, under the seventh school month, the -- the computer printout has 511. Do you see that?

Q. And on top it says "seventh school month, 15 days." Okay. Well, the 511 is the total of absentees that they -- they reported during that 15 days, isn't it, Doctor?

A. Yes. That's my interpretation of the charge. (R.T.. 929, l. 1 - 16)

Q. Okay. (Referring to exhibit 7) If you look at the number for the sixth school month, I think it's 554, and there's 17 days. If you divide 17 into 554, you get the number that's right next to it. It;s 32.6, okay. Now, Dr. Patrick, I know it's been a long time since we went through this, but would you look at the list of handwritten -- (pause)

A. (witness complies)

Q. First one, it says '10th,' and then the first column of numbers.

A. Yes.

Q. Okay. Now, -- now, if I tell you that the first 5 there means that this -- this particular student was enrolled in a fifth period class, and that's all, and then the next 5 is the same thing. The next 2 and 5 means that this -- this student was enrolled in a second period class and a fifth period class. Okay. And then you follow down, like, there's one here where there's a 3, 4, and 6. That meant that the student was enrolled in period three, four, and six. Okay. Then, if -- if I took -- if I counted up the number of numbers in this column, you know, assuming that this is true that this represents the period in which the student was enrolled -- If I counted up these, the number of numbers represented here -- Okay. And I did. It's 142. Okay. If I -- If I divided by four -- do you see the

number on the bottom there? 142 divided by 4? A little bit more than 35?

A. Well, the page I have shows the 142 divided by 83.

Q. Okay. Well, if you looked at the number underneath, 35.5. If you divide 142 by 4 -- I just wanted to do it the way we were talking about. It's 35, right?

A. I read 35. I'm assuming the computation is correct.

Q. Well, if you just did it yourself; it would be 35. 142 divided by 4, 35.5.

A. (no audible response)

Q. Okay. Now, if you count the number of students on this list, there are 83 students. Okay? Do you want to go on that assumption, or do you want -- (pause.) Assuming that there are 83 students, there are 142 classes that they're taking altogether; and then if you did it the way Madison was doing it at the time, then the most -- you know, the income for those -- for those 83 students would be 35 1/2 students; isn't that right? Isn't that true?

A. Well, let me make an observation if I could, please. The process you're using and the procedure that Madison and Pupil Accounting developed was a relationship entirely between those two units. My only role was to ensure that

Pupil Accounting would be able to say they had provided the information to schools necessary to record the daily attendance of all students and that the principal, who is legally responsible for attendance in that school, was reporting in compliance with those procedures. Now, I understand this exercise, but I could only work with the procedure that Pupil Accounting has established, because those become the legal records for an audit, both by our own district and by our independent audit that's conducted annually.

Q. Dr. Patrick, I'm not trying to -- to, you know, trap you or do anything to -- I mean, I understand. I think we went through it that -- that -- that there were some diffenent -- different schools were following different procedures - right? - at the time? I'm just -- just saying if you went through -- if you you understand this exercise. All right.

A. I understand your exercise, yes.

Q. Okay. Well, then, this number of students, if they had been enrolled in -- if these same students had been enrolled in the same period at Madison High during that 1974-75, they would have collected 35.5 A.D.A. as a maximum; Isn't that true?

A. On the basis of these data, that would be correct. (R.T. 931, l. 6 - 933, l. 22)

Q. Okay. Let's just go back to 1974-75. Do you recall that, you know, I did some studies and brought up some things at the board pertaining to attendance, just a study relating absenteeism to grade point average?

A. Yes. I recall you made a report to the board. (R.T 935, l. 14 - 19)

Q. Okay. Okay, were you -- now, after this -- I don't know the exact date, but were you in the executive session where I brought this into the executive session and said that these numbers showed that we -- we must be collecting some money illegally?

A. You're on exhibit 7 now. No, I don't recall you appearance before executive counsel with ths report.

Q. No, not the executive counsel. It was the Board of Education, the board members and the superintendent. You weren't in that meeting?

A. I don't recall that. (R.T. 938, l. 3 - 7; l. 12 - 17)

Q. Okay. So you weren't in attendance at this. All right. Did you hear, sometime during that time frame, some reference to my going to -- to County Superintendent Dixon?

A. Yes, I heard.

Q. Okay. Now, did you -- you were

taking -- or you -- well, can you recall what you heard or what you -- about Dixon? Or do you remember?

A. I simply heard that you approached Dr. Dixon to have an audit done of the district's attendance procedures.

Q. Okay. Now, during that period of time, did Dr. Stegeman -- you -- I mean, there was a superintendent, and then the deputy superintendent was Dr. Stegeman, and then you, right?

A. That's correct.

Q. All right. Did Dr. Stegeman or did anybody ask you about attendance procedures relating to students enrolling -- enrolled in fewer than four classes? Did they ask you to study it?

A. As I recall, Dr. Stegeman asked that I conduct a study with the Pupil Accounting department of the problem of students in partial attendance and to ensure that all procedures for 1975-76 would address any issues that existed at that point. This had been under way, I would say, over a period of several years as we began to refine the kinds of programs and adjustments that would be necessary for these students.

Q. Well, can you recall that -- that we spoke -- I think you recall, you know, one meeting with Mr. Jackson and you, the three of

us, and went over this calculation? And I believe you -- you -- you recall telling me that there was a problem with negative attendance and that -- that you were -- you have a committee and -- you're studying it and, you know, you're going to make recommendations for a change in the attendance manual that the attendance clerks of the schools have to go through? Do you recall that?

A. Now recalling the meeting with you and Mr. Jackson?

Q. Well, I -- I think I asked too many things in one question. First of all, do you recall the meeting? Do you recall that we met on this issue?

A. Well, I do recall meeting with you, but I don't recall specific times and the agenda that we might have discussed; but I do recollect that you and I discussed this concern and that I directed Mr.-Jackson in -- both working with him, but -- to pursue specifically the attendance programs and procedures in selected high schools which would be the basis for revising the manual for 1975-76.

Q. And this pertained to the attendance accounting for students enrolled in fewer than four classes, right?

A. That was one element of the total plan, but not the limit of our strengthening attendance

accounting. (R.T. 939, l. 13 - 941, l. 8)

Q. Well, then -- I mean, did -- is it true that you -- All right. When you were apprised of this problem, you know, your division worked on it and gathered information and changed the manual; and the manual, the attendance procedures for 1975-76 were such that if San Diego High School was following the attendance procedures, they, the district, would not be collecting A.D.A. illegally. Isn't that true?

A. Yes. That's correct.

Q. And assuming that these students are -- were enrolled, you know, when we went through our exercise, in the number of classes that are -- that we counted up, the -- your division saw to it that the change in the manual was such that they could collect the 35 days' A.D.A., right? At most?

A. The manual, when issued for 1975-76 applied to all students, not limited to the group that you have reference to. That was a district-wide procedure at that point.

Q. Okay. so the procedure was changed so that you would -- that a student enrolled in -- in two classed attending every day would -- would collect or bring the district a maximum of 50 percent A.D.A., right?

A. Yes.

Q. Now, I'm sorry to go through all this thing; but I think that I want to get at what actually -- you know, happened. Okay. Now, did Mrs. Larsen or anybody that you identified with her campaign ever ask you about these?

A. No. (R.T. 946, l. 28 - pg 947, l. 27)

Larsen Defendants' brief:

'All of these charges were proven to be false.

First, FISHER charged that "the District had submitted for income purposes false attendance records" and that the Superintendent "steadfastly refused even to investigate the violations." (Amendment for Appellant's Opening Brief, p. 6.)

The evidence established that this charge was false. Superintendent Goodman denied the charge. He testified that the attendance records were accurate and that he had investigated FISHER's contention of violations. (VII R.T. 361.)

The testimony:

Q. Did the media tell you that I asked for your resignation?

A. That's my recollection. I think the media also told me that you had -- that they had suggested to you, they said, "If you, after accusing and accusing for a number of years -- If it's found that not to be true, what you've charged Mr. Goodman

with, would you resign from the board?" And you, said, "Yes." That's my understanding. That was repeated to me by the media second-hand; and, of course, you subsequently never did resign.

Q. We.., did you ever attempt to show that -- or to disprove what I had said?

A. Oh, Yes. The staff has to respond when a Board member, as an elected public official, brings up a concern. The professional staff must answer that, because the elected person is accountable to the pulic. The professional staff member is accountable to the Board. They're the persons who hire or fire that person, and that goes back to the developers' fees and our three attorneys and verifying that with a memo. It goes back to your accounting of attendance of pupils' and Dr. Patrick and his staff and the county superintendent and the district attorney Ed Miller's office all looked into it and said there was nothing wrong. I was perfectly happy to have your charges brought up in any and every case and investigated throughly. (VII R.T. 361)

Larsen Defendants' brief:

Goodman testified that Dr. Patrick and his staff, the county superintendent, and the district attorney had all investigated the attendance reporting and found nothing wrong.- (VII R.T. 361; VIII R.T. 462,

lines 14-17; 463, lines 2-6, 505-507, 538, 542.)

The testimony:

"This was just another one of your charges, Mrs. Fisher, against me and the school district, the administration; so I was used to it. We did investigate, and Dr. Patrick reported that we in fact did have honest attendance." (VIII R.T. 462, lines 14-17)
"At some point. I don't know how soon after, but at one point Dr. Dixon called me, said that you had come up to see him or his staff and had made the charges. They did an investigation, and he said that there was nothing wrong, that we'd be clear." (VIII R.T. 463, lines 2-6)

Q. All right. What was her attitude or demeanor as you observed it in that meeting; that is, was she joking? Did you think she was serious, or what impression did you form from her conduct and statements to you that morning?

A. Well, Mrs. Fisher was just -- came in and said, "Look, Tom," as I testified last Friday. "We've got a problem," and so forth, and went from there; but there was no question in my mind. I mean, she wasn't highly emotional, but there's no question about her concerns and what she wanted from me.

Q. All right. Then you told her if she believed that you had committed

the acts that she said she would make public that -- you told her to go to the grand jury or the district attorney?

A. Yes.

Q. And her response was that she already had but they wouldn't listen?

A. Yes. But she said with the support -- If she made the charges the next Tuesday at the public board meeting against me with several thousand teachers there, she'd get a proper hearing.

Q. Okay. Now, of the four matters she discussed with you, the question of the propriety of the school attendance records had been previously investigated when she previously made that allegation. Is that true?

A. Yes, sir.

Q. And that was done in-house in part by -- that is school staff people?

A. Yes, sir. By the secondary school staff people.

Q. And did you get a report back from somebody on her allegation?

A. Yes. Dr. Patrick, I believe, reported back to me that --

Q. Do you recall the substance of what he told you or what his findings were?

A. Well, in a sense, that we had not done anything in violation of state attendance accounting procedures or law.

Q. All right. Was his report presented to the Board?

A. I can't -- I would imagine that we would have responded, since the allegation was made in the Board's hearing or of their knowing.

Q. All right. To your recollection at any time did any other member of the School Board confirm or support Mrs. Fisher in her allegations about school attendance records being falsified?

A. Not one.

Q. All right. Now, you said that Dr. Dixon phoned you and told you that he had looked into her allegations and that there was nothing wrong with the school attendance reports?

A. Yes. The county superintendant, Dr. Dixon, called me; and I dont't know whether he'd been asked by anybody or whether he'd read in the paper. He did indicate that they had done an investigaton as an arm of the state department of education and found no wrongdoing.

Q. Also, so it's clear, Dr. Dixon is totally independent and separate from the position you held with the San Diego School Board; isn't that

true?

A. Yes, sir.

Q. There's no employment relation between the two of you at all?

A. No. He works for another board who is elected throughout the county.

Q. All right. Now, in substance, as Mrs. Fisher has indicated, the result of false attendance records could be either receiving more or receiving less funds than the school is entitled to under public law; is that right?

A. Yes, sir.

Q. Now, isn't it true that the finances of the school board are audited by independent certified public accountants every year?

A. Yes, sir.

Q. Who did that?

A. I believe Peat, Marwick and Mitchell were our outside independent auditors at that time.

Q. All right. Did the independent auditors ever report, to your knowledge, any impropriety in the way the school handled reporting attendance for purposes of receiving funds from the state?

A. Not to my knowledge, never. (VIII R.T. 505-507)

THE COURT: I think this question wants to elicit from Dr. Goodman whether anybody went to the trouble of seeing whether her charges were actually true in fact. Is that your question?

MS. FISHER: Yes

THE COURT: I thought he's told us about five times that he referred it out to some functionary.

THE WITNESS: Yes. sir.

THE COURT: And a state functionary. Tell us again what you did to determine whether these charges were true, and I'm talking now about the attendance records.

THE WITNESS: Yes, sir. This was referred to the people who were responsible for the operation of the 40 secondary schools, junior and senior high schools, for their investigations. I believe you only referred to four or five schools, and they were to look into the attendance accounting and the figures to validate whether or not the youngsters were enrolled; and their report back was that we had not done anything invalid and apparently the county superintendent even investigated, although I don't think we asked him to. We may have. I can't recall.

BY MS. FISHER: Well, did they ever -- did anybody ever tell you that they had gone through the list and they had gone through the argument

that I presented and shown that there was anything that was false?
A. Well, they told me that we were not doing anything illegal; and as I say, that was validated by the county superintendent in a follow--up. (VIII R.T. 538)

Q. Okay. Didn't Dr. Patrick tell you that he, after -- there was a sequence. I brought it up in the session and it went to the county superintendent and then Dr. Patrick. Dr. Patrick reviewed, Dr. Patrick and his staff; and he was just asked this. Didn't he tell you that they saw that there was -- the policy was such that -- that students could be counted as fully enrolled whenever they were only partially enrolled and that they made a change in the policy?

A. He didn't tell me that, per se, to my knowledge. You have subpoenaed him. He'll be here, and I think you can ask him that; but to my knowledge, he didn't say that to me, no.

Q. He never told you, "Well, there was something to it, and I changed it and fixed it"?

A. Not to my knowledge, Mrs. Fisher.

Q. Well, do you have any recollection that he told you that there wasn't any problem, there were not changes required?

A. I don't recall what he said exactly. All I know is that they

did an investigation at my behest and the Board's and indicated that what we were doing was valid, because if it weren't we would lose significatnt funds for the district from the state.

Q. And they indicated that they didn't change any policies?

A. I don't know that he indicated he changed any policies.

Q. Did he indicate that he didn't change any?

A. Policies come from the Board of Education. Administrative procedures are based on those policies.

Q. All right. Procedures, then. Did he indicate that he didn't change any procedures?

A. Not to my knowledge. As I said, you'll have an opportunity to question him, I'm sure, when he comes to court. (VIII R.T. 542)

Larsen Defendants' brief:

Dr. Patrick testified that he had investigated the matter at the superintendent's request and found no violations of district policy or state law. (XI R.T. 952-954.)

The testimony:

BY MS. JOHNS: Dr. Patrick, as I understand your testimony, in 1975 the district had -- was in the process of conducting an ongoing

investigation and review of the attendance accounting procedures because new problems had arisen with respect to the new programs that were institutied in the '70's. Is that correct?

A. That's correct.

Q. And did you, additionally, in 1975 conduct an investigation at superintendent Goodman's request to look into Mrs. Fisher's particular concerns?

A. Yes. That was responsive to both Dr. Stegeman's and Dr. Goodman's request.

Q. Could you describe for us that investigation, generally?

A. It included, specifically, San Diego High School and other schools that Mr. Jackson and I felt appropriate to investigate, because we wanted a broad basis for evaluating problems relative to students attending less than a minimum day. As I recall, this would have included Kearny, Crawford, Lincoln, Mission Bay, in addition to San Diego High School.

In the -- each instance, I worked with Mary Estes from pupil accounting and then Mr. Jackson, who in turn was -- had the responsibility of working directly with the schools to ensure that the district attendance manual, as it existed for the -- both 1974-75, and then later 1975-76, as revised, was being carried out by schools

such that the attendance procedure produced the attendance data that complied with district requirements, the state accounting manual for attendance, and the administrative code, Title V.

Q. And did you determine that they were in fact in compliance?

A. Yes. I examined specific student records, and most particularly, again, San Diego High School, with Mary Estes to ensure that these data were being provided sufficiently for her to certify that they reporesented an accurate attendance recording to the state.

Q. And were you satisfied that the procedures at San Diego High School, specifically, were followed -- that were followed at San Diego High School were valid and reliable?

A. Yes. I worked directly with the -- Mrs. Plaehn, who was the attendance coordinator, and less directly, but also, the attendance clerks - and I recall Mrs. Bush and a Mrs. Gutierrez - to review their daily attendance reporting, which included the master list of absences, that information as obtained from parents both orally and by note, to substantiate the kind of absence for each student; and that they, in turn, maintained those files at that school for later audit.

Q. Did you find in your investigation any information that would

substantiate or corroborate the charge -- and I'll quote from Exhibit 18: "Mrs. Fisher said that the district had submitted for income purposes false attendance records."

A. No. I found no evidence of any fraudulent reporting by any school personnel for the secondary schools division which would be a basis for concluding we knowingly were reporting improper information that resulted in the district receiving apportionment revenue in areas that were not allowable.

MS. JOHNS: Thank you, Dr. Patrick.

THE COURT: Redirect.

BY MS. FISHER:
Q. Well, Dr. Patrick, did I ever say, when we had the discussions about this problem of collecting full A.D.A. for students who were only taking fewer classes, that I thought somebody was knowingly making a false report?

A. Would you restate your question?

Q. All right. Well, isn't it true that -- that when I pointeed this out I never said that so-and-so is knowingly making a false report, right?

A. You want me to -- I'm not sure I know how to respond to your question.

Q. Well, did I tell you that

somebody is knowingly making a false report?

A. No. I do not recall that you said that.

Q. Okay. Well, if -- if when Madison's -- I mean, during this year when Madison was reporting -- or collecting only 50 percent A.D.A. for a student who was attending two days or two classes a day, wasn't that because that's what the law says you're supposed to do?

A. No. That's the concern I think indicated, that the state accounting manual for Title V included any specific reference as to how to process the attendance for students enrolled in less than 240 minutes. The advent of the use of partial exemptions, which did reduce the students to less than 240 minutes, was not a matter of procedure for schools to fully carry out during the 1974-75 period. There was no intent on the part of Mrs. Plaehn, to name one individual, or attendance coordinators in other schools to deviate from what was in district procedure.

Q. All right. I don't think there's any question of intent. If you have -- if you have state -- I mean, if a minimum day -- a minimum day was 240 minutes, was it not?

A. That's correct.

Q. At this time. And the amount

of income earned for somebody taking half a minimum day was half the income for the minimum day, wasn't it?

A. Are you talking about an arithmetical computation --

Q. Yeah.

A. -- or a accounting procedure? The arithmetic would be correct.

Q. All right. then, whether it's knowingly or unknowingly, if a school is collecting a full amount of income for a student who's only taking a fourth of a minimum day, then that school is collecting more money than it should be collecting, isn't it?

A. It would be. That's true. (XI R.T. 952-956)

Larsen Defendants' brief:

Board President George Walker Smith testified that the district attendance acounting procedures complied with the law. (XVIII R.T. 2041-2042, Exhibit H.)

The testimony:

Q. Now, you made a response to her charges. Do you recall that?

A. True.

Q. And in substance, you said -- and I will get into them. But in substance you said that all four of

them had been investigated and found to be untrue and without merit.

A. That is true.

Q. Now let me run through them. The four charges she made was falsification of average daily attendance records of school pupils by the administration and by Dr. Goodman. Do you recall that?

A. I recall it.

Q. And had that been previously investigated?

A. By the County Department of Education. It's been turned over to the county department. They found no wrongdoing.

Q. All right. And you also had a staff of school attorneys who could respond to any such request?

A. That's true.

Q. And did you have confidence in the ability and the honesty and integrity of the staff attorneys for the school?

A. If I had not had that confidence, I would have brought them to the Board and fired them. (XVIII R.T. 2041-2042)

Larsen Defendants brief:

Thus the jury heard the testimony of numerous independent witnesses

> on this issue. These witnesses unanimously testified that the district attendance accounting policies were legal. Clearly there was substantial evidence for the jury to find that this charge against Superintendent Goodman was false.

DEVELOPER'S FUNDS

Fisher's statement:

> "The superintendent just during this last year, he admitted to missappropriating half a million dollars of district funds. It is not a violation of law but it is a direct violation of district policy."

Plaintiff put into evidence (exhibit 27) the schools' attorney's opinion that collection of the developers' funds would not be legal if there was no need for school facilities at the school(s) that served the residents of the development. This opinion as well as the portion of the Board of Education policy that stated that money collected for each development had to be used 'exclusively to defray cost of land acquisition, school site development, and construction of adequate school buildings and facilities to serve the residents

of the proposed area' were read into the record during the testimony of Dr. Goodman (R.T. 315 - 317). The exhibit also contains the list of funds collected by school area, a list showing where the funds were spent and a copy of the portion of the policy which stated that funds were to be used for the local school.

> THE COURT: Now, you may read the paragraph which you will want to read here, and we'll understand, Mrs. Fisher, that this is a contract which was -- or at least a policy provision whereby the developers who wished to develop land into residential use had to comply. Now, read that paragraph.
>
> Ms. Fisher: It says the the developer can, "donate (to) the district a sum of money, which sum was mutually agreed upon by the district and the proponent of the rezoning, development, or redevelopment of the proposed area, such money to be used by district exclusively to defray cost of land acquisition, school site development, and construction of adequate school buildings and facilities to serve the residents of the proposed area."
>
> THE COURT: All right. Now read the paragraph in the school's

attorney's opinion.

Ms. Fisher: Okay. "You've asked whether it would be lawful to collect from each developer within the boundaries of San Diego Unified School District a set amount for the provision of school facilities."

"There's no authority to collect a fee from a developer who is building in an area in which there are school facilities -- facilities available to serve the school-age children who will reside in the development. The Board of Education has been consistently advised over the years that the authority to require donations from developers is not clearly articulated in the law. Such authority exists only by reason of the 'crisis' or 'emergency' nature of the problem; namely, that without obtaining such fees from developers there would be no school facilities available to serve a particular proposed development."

"In the absence of being able to show that without the developer's donation it would not be possible for the district to provide schools to serve that developer's project, we are convinced that the courts would hold invalid the policy requiring a developer to donate funds to the district."

It says,

"Approximately four years ago the district made a very substantial effort to obtain legislation which would allow it to collect a set fee for each house constructed in the

district, and there was no support for this approach." (R.T. 315 l. 8 - 12, 17 - 28; 316 l. 4 - 317 l. 5)

John Witt's testimony was consistent with Fisher's as to what the restrictions on expenditure of the funds were. (R.T. 227, l. 23 - 228, l. 1)

Defendants offered no evidence to contradict this. They did not dispute the fact that the funds were collected as an assessment over and above normal taxes, or that the Board's publicly approved policy specifically stated that funds collected from a developer were to be spent at the local school. There was no evidence offered to the contrary. Yvonne Larsen testified that she considered a similar shift of funds to be a misappropriation.

Q. Okay. Lets just -- Mrs. Larsen, suppose that -- that you were -- you were assessed, you as a homeowner were assessed, a sum of money to put a curb in front of your house. Okay? Suppose -- you're familiar with assessment districts right?

A. Generally.

Q. Or Assessment. All right. Suppose you paid some money to -- and you just paid a fee to the city in order to put a curb in front of you house. Okay. Now, suppose the -- the city didn't use that money to put a curb in front of your house and they didn't put a curb in front of your house. I mean, they didn't -- they didn't do anything pertaining to your house with that money. Would you consider that to be a missappropriation of the funds thhat you turned in?

A. Yes.

Defendants' witnesses, Goodman, Edmiston and Smith all said the staff 'looked into this and found nothing wrong', but they didn't say anything specific. Smith testified that the Board voted on all District expenditures, however he did not contradict Fisher's testimony that the Board was not notified, prior to her request for infomation, that the funds had been spent in a manner contrary to the Board's policy.

Larsen Defendants' brief:

> Again, the evidence established that this charge against the

superintendent was false. Superintendent GOODMAN testified that the school's attorney investigated the charge and found it to be completely without merit. (VII R.T. 310-311, 508)

The testimony:

Q. Okay. Now, about these -- these items -- okay. Let's take the developers' fund. Isn't it true that the -- the issue of developers' funds was something that had been brought out in open meeting and -- and discussed and I, you know, said what I had to say and you said what you had to say and it was all in a public -- publicly accessible tape recording?

A. When you raised an issue about developers' funds, the other board members, after hearing you, as I recall, asked us to have our attorneys -- and we had three staff attorneys full time in the city schools, ask them to look into the matter and to see if our use of developers' funds, the funds they donated that help us construct schools or buy portables, was legitimate; and our attorneys determined that the use was legitimate, yes. That was a public issue that you made.

Q. Okay. do you remember what the details of that was -- I mean, were?

A. Faintly I recall that you charged that if we collected donation of fees from a developer

in Mira Mesa and then we used those funds to buy a portable for Mac Dowell's School in North Clairemont, which is right adjacent to Mira Mesa, or if we bought a portable at Kearny High School, which at that time we didn't have high schools in Mira Mesa or elementary schools, so we transported youngsters, you felt that was illegal under the contract we had with developers. We asked our attorneys to look at it, and they determined that what we were doing was legal. You still didn't believe that. (VII R.T. 310-311)

Q. Now, the misuse of developers' funds was one of the other charges?

A. Yes. sir.

Q. And you said that she raised that issue prior to the Sunday meeting?

A. Yes, sir.

Q. And you turned that matter over to the school's attorneys' office to investigate?

A. That is correct.

Q. And that was headed by Ralph Stern?

A. Mr. Stern; yes, sir.

Q. And I believe he had two associates, did he not?

A. That is correct.

Q. And Mr. Stern reported back to the Board, did he?

A. That is correct.

Q. And what did he report back to the Board, in substance?

A. He reported, based on his interpretation of the policy under which we operated, we had done nothing illegal or untoward, out of the way.

Q. All right. To your knowledge at any time did anybody who was ever another member of the School Board support Mrs. Fisher's position of a violation of the contracts between the School Board and developers who paid funds into the school account?

A. Not one to my knowledge. (VIII R.T. 508)

Larsen Defendants' brief:

Board member Dorothea Edmiston testified that she was satisfied from the investigation that the charge of misappropriation was without merit. (XVII R.T. 1932, 1998.)

The testimony:

Q. Do you recall that Dr. Patrick looked into the attendance accounting practices?

A. Well, it would be -- he would be the one that would do it, but I

can't tell you specifically what was done.

Q. But did you feel satisfied that it had been investigated by staff and that there was no illegalities in the procedure?

A. Yes. I felt satisfied to that.

Q. And another charge that came up was misappropriation by Thomas Goodman of developers' funds. Do you recall that?

A. Oh, yes, very clearly.

Q. And did you believe that there was any merit -- as a Board member, did you feel that there was any merit to a charge of misappropriation?

A. No. I thought there was no merit. Channel 39 made an investigation of it. Oh -- various groups within the city investigated it, and he came out with a -- with a clear no -- no violation at all. I was and I am satisfied that there was absolutely no violation. (XVII R.T. 1932)

Q. All right. The misappropriation of -- I said that -- that the superintendent had misappropriated a half a million dollars. Do you recall what -- what -- what it was I was saying and what it pertained to?

A. Yes. I'm not sure I can put it in an exact time frame, but I think long before this point that had been

investigated and found to be without any basis. If not, it was done afterward. I think it had been done already at that time.

Q. Okay. Do you remember -- do you recall what it was I said about the half a million dollars?

A. Yes. You said the money was collected one place and spent another place and that that was illegal.

Q. Okay. Was that false?

A. I don't remember the details of where the money was collected and where it was used. I remember that a thorough investigation was made and nothing was illegal or even -- "immoral" isn't the word, but "irregular" even irregular that has been done. It was without any basis at all. The claim was without any real basis.

Q. Okay. Did you have an understanding that the only justification for collecting the money from developers was because there were not any schools in the particular area?

A. Yes.

Q. Did you recall that the -- that the Policy of Availability of Schools stated that we had to spend the money -- you know that was part of our agreement, that we were going to spend the money in the particular school area?

THE COURT: Now, I don't apprehend whether she knew that or not has anything to do with our lawsuit. You've been through this so many times that you cannot believe that the jury doesn't understand your position. Whether she knew about it or not is immaterial, because she's not on trial. (XVII R.T. 1998)

Larsen Defendants' brief:

School Board President George Walker Smith testified that the charge was false. (XVIII R.T. 2042, Exhibit H.)

The testimony:

Q. Second charge she made was that Dr. Goodman had misappropriated a half a million dollars of developers' funds. Do you recall that?

A. I recall that.

Q. And had that previously been investigated?

A. I understand Mrs. Fisher had even gone to the District Attorney, and there was no substance found.

Q. So you were satisfied there was no basis for that charge?

A. Definitely so. Especially since the superintendent cannot spend a dime without the Board's approval, and especially when it relates to property and money it takes four votes.

> Q. All right. So any funds that had been received by the Board and spent from this developers' receipts had been spent in accordance with the board vote?
>
> A. Policy, yes.
>
> Q. Correct?
>
> A. That's true. (XVIII R.T. 2042)

GUFFIN

The statement relating to Ed Guffin,

> "Just recently an administrator was transferred and the action of the Board was hidden from the Baord. The transfer...the Board voted on the transfer without knowing it. The transfer was put in with personnel...the personnel action forms"

There was no evidence offered by defendants to refute this. Plaintiff submitted (exhibit 16) that included the personnel action form at issue and testified that Guffin's transfer was not submitted to the Board for approval and that Board members did not know they had voted on it until the grievance procedure hearing. (R.T. 1037). She read into the record the portion of the policy which states

that administrative transfers shall be submitted to the Board for approval. John Witt's testimony supported that of Fisher.

> Q. Okay. Do you recall finding out during that executive session that the matter had been put on personnel action forms?
>
> A. I recall that happened on -- on -- on a reassignment at one time. I am not sure that was the reassignment on which it happened. I recall that a personnel action form procedure covered a reassignment of an administrator at one time.
>
> Q. Okay. Would you explain to -- to the jury what a personnel action form is?
>
> A. A personnel action form means that it's a routine reassignment; and even though it requires approval by the board, it's considered to be suffieiently routine that it doesn't have to involve individual evaluation. Reassignments that are of greater significance are all individually discussed and approved by the Board in closed session prior to being voted upon in the open meeting.
>
> Q. Okay. Now, isn't it true that administrative assignments are never put under --
>
> A. True.
>
> Q. -- the personnel action form?

A. True.

Q. Okay. This assignment was put under the personnel action form, so we didn't know what we were voting on when we voted on it?

A. As I recall, that procedure happened on that case. I can't -- there was an explanation for it. I don't recall what the explanation was.

Q. Okay. And you recall that -- that Mr. Guffin filed some sort of a protest or something?

A. Yeah. I recall that.

Q. And -- and there was an executive session?

A. Yeah.

Q. And the superintendent asked to have his action approved, and you voted against it?

A. Yeah.

Q. I voted against it?

A. Right.

Q. Okay. I don't know if there's any -- (pause.) And a majority of the Board voted for it?

A. Yes. (R.T. 221, l. 25 - 223, l. 7)

THELMA JOHNSON

Fisher's statement,

> "A few years ago we had a grievance based on the transfer and demotion of Thelma Johnson. This went to arbitration. The arbitrator severely criticized the district for violating its own policies. Dr. Goodman got the issue through the Board...he pleaded with the Board; he said, "Are you going to support me or the Teachers' Association? We didn't even discuss the issues. The Board overturned the arbitrator's decision."

No evidence was introduced by defendant's showing this to be false. Appellant testified about the Board's hearing and submitted the arbitrator's decision (exhibit 17, see E-8) It included the following paragraphs.

> "The Stegeman [Deputy Superintendent of Schools] memorandum continues: 'There are also reports of favoritism toward certain other staff members and allowing many absences from the site.' Again, at the hearing not a single report was produced, nor even, one witness proffered, in support of that damaging and quite evidently misleading assertion.
> "The memorandum alleges that Mrs. Johnson, sent by the District to Sacramento to talk to legislators, sought to 'get rid of the administration in the San Diego programs.' The asserted source for this very serious accusation was thus de-

scribed: 'One of the parents who accompanied her advised us.' Now whoever that person was, if such a person existed, no one was presented by the District at the hearing as a witness, either voluntarily or under subpoena, to testify and be cross-examined about what Mrs. Johnson allegedly did or said to warrant such a damaging accusation of disloyalty. That kind of faceless defamation is wholly inadmissible in arbitral or judicial proceedings. It is so profoundly incompatible with the basic American precepts of procedural fairness and justice that it is universally denied even the slightest scintilla of evidentiary weight. The same infirmity of proof applied to the repeated references to clerks and staff members when the District did not produce to prove under oath its allegations of what they said, thought, or did. In sum, therefore, the dictate of the Agreement mutually negotiated by the parties is that if information is received (or solicited in written form that, one, is derogatory to a teacher and two, constitutes an input relevant to adjudging performance, its receipt becomes the occasion for its disclosure. This may be through a conference with or a memorandum to the teacher. Its validity may thus be tested. It is part of the employee's 'file,' for the contractual purpose of the right to disclosure and commentary, regardless of in which manila folder or in whose memory it may be stored. If the derogatory data is

not committed to writing, filed, and disclosed, but is regarded as an input relative to adjudging performance, it is likely to be held at a later date (as here) to be inadmissible or its evidentiary value to be seriously impaired in a subsequent proceeding when proffered as proof.

Failure of the District to Adhere to the Board's Own Procedures for Transfer

When Mrs. Johnson was demoted she might well have wished to remain as a teacher at Kennedy. Demotions by no means automatically entail transfer from a site. There would obviously be factors pro and con both for her and the District to consider and discuss. But no conference occurred; she was simply notified...of her transfer to Euclid. She was summarily transferred. Inexplicably (and unexplained), this was even handled in a manner disturbing to the children in attendance at the Center at the time. As one parent reported it, "The fact is the day Mrs. Johnson was removed in the Center, when we came from work that afternoon the kids were just hysterical. They were all crying, 'Why did they take Miss Johnson away? What happened?' They did this in front of the children -- and I think if they were so concerned about our kids they wouldn't have done it in the manner that they did." (Mrs. Vilma Scott, Tr. 238)

Yet, in contrast, the District's own regulation (No. 4330, quoted

above at I-C-3) is quite detailed and precise about how transfers (regardless of the existence of any preceding employer action, whether promotion or demotion) shall be accomplished.

It is patent sophistry to suggest that the District's action transferring Mrs. Johnson from Kennedy to Euclid was not a "transfer." Dr. Goodman was explicit in his letter of December 10 in recognizing that the action was indeed a transfer. Failure to adhere to the transfer procedures is not simply some inconvenient technicality to be casually overlooked. (There is a considerable irony in the effort of administrators to avoid adherence to "awkward" strictures of District and contractual procedures themselves while being so critical of a Head Teacher for failure to adhere to yet another set of District procedures no less "awkward" -- albeit necessary -- by everyone's acceptance.) The rights conferred on teachers by the Board in instances of transfer are substantial ones and should not be allowed to be flouted. The failure to accord Mrs. Johnson these rights was contractually wrongful and it constitutes a material element in the conclusion of the Arbitrator that the District did not act reasonably and justly in her demotion and transfer."(Exhibit 17, Opinion and Award In the Matter of Arbitration Between San Diego Unified School District and San Diego Teachers Association before Edgar A. Jones Jr., Impartial

Arbitrator, June 17, 1974, pages 38-39)

Defendant's witnesses defended the vote for the demotion (Edmiston R.T. 1975, Smith R.T. 2043), but they did not dispute the content of the arbitrator's report, nor did they contradict Fisher's testimony about the Board's lack of discussion during the grievance hearing.

Larsen Defendants' brief:

> FISHER's third charge was that "there have been many violations of district policies in personnel matters." (Amendment for Appellant's Opening Brief, p. 6.) FISHER then cited two examples of what she claimed were violations of district personnel policies. Once again, the evidence establishes that Goodman violated no district policies in these cases. Goodman denied violating any district policies. (VII R.T. 377-391)

The testimony:

> Q. Now, does the name Ed Guffin -- is that familiar to you? Do you remember Ed Guffin?
>
> A. I remember the name "Ed Guffin," yes.
>
> Q. Do you remember what the contro-

versy was or what this -- this -- you know, so-called charge that I supposedly made was about?

A. I don't. You would have to tell me.

Q. All right. Do you recall a hearing in executive session regarding the transfer of Ed Guffin?

A. We may have had one. The name rings a bell, Mr. Guffin, but, again, we had so many executive sessions and so many hearings, I don't really recall that specific case. With twelve thousand employees, it's hard to remember every one.

Q. Okay. Well, could I explain -- okay.

Is it consistent with your recollection that the accusation that I made regarding Ed Guffin wasthat Ed Guffin was an administrator and that -- that there had been an attempt to transfer him at an earlier time and the Board resisted, and that he was transferred out of his job by putting the transfer in with the personnel action forms and that there was -- that he filed a complaint, I think it's through the Administrators' Association, and it wasn't until the complaint, you know, through his attorney, came to the Board of Education that the Board realized that they had actually taken the action? Now, is that -- do you recall what the -- what it was all about now?

A. I don't recall that version. I recall that Mr. Guffin was a matter of closed-session discussion, but I can't tell you specifically what he was doing or what he was reassigned to do or if he was reassigned or demoted.

Q. Well, did you ever attempt to show that -- that I was wrong in regard to Ed Guffin?

A. I didn't really hav to attempt to show anything. Under California law, in order to issue pay warrants to people in public service you must have Board action or Council action or Supervisors' action. It must be affirmatively ratified in a public meeting, and thereby -- that you can issue a pay warrant. Every move that we make in public service has to be ratified by the elected Board of Directors. So if the rest of your colleagues, the other four Board members who would represent four-fifths had any concerns, they could have stopped that if it were illegal or unethical or unauthorized or whatever.

Q. Okay. The --

A. Or they could rescind the action if they found out, if it were something sneaked by, as you said.

Q. Okay. I don't think I'm contesting that; but is -- did you -- if I could phrase it in the words of the judge: Did you ever ask anybody, any sort of independent

group or person who -- who was not associtated with the -- any of the policy to examine the circumstances regarding Ed Guffin's transfer and demotion and -- well, did you?

A. Well, not unless you're talking about the time that we brought it up with the Board in closed session, because that's where you discuss personnel matters. Other than that, once the Board ratified it, unless three of the five Board members asked us to go back and see if it was proper, we wouldn't do that. We wouldn't do it just at the behest of one Board member.

Q. I don't think that the issue is whether something was done and the Board member -- the Board ratified it. I think that that's -- you know, that's -- we all agree on that. I think the question is whether -- whether the statement that I made, that this transfer was put in among personnel action forms when it was truly a controversial transfer and it was an administrator's transfer, whether that was true.

Now, did you ever do anything to show -- well, first of all, would it be difficult to show whether the transfer was a personnnel action form or was in among the Administrative transfers? Can you explain --

A. Yes. I think the jury should know that, again, with twelve thousand employees, as you can guess, you probably have several

hundred personnel actions at every week's meeting. It could be promotions, lateral assignments, reassignments. It could be demotions. It could be dismissals. It could be leaves of absence. And for those things that are considered either to be routine or, perhaps, sensitive that might be harmful to a person's reputation, those generally were handled by personnel action forms, a stack of which were on the desk of the Board table by the personnel officer, in which Board members were given the opportunity any time to go through before the Board meeting or go through during the week preceding the Board meeting. We would not highlight a demotion of a lower-level person, as I recall Mr. Guffin was. We wouldn't try to highlight the demotion an upper-level person, just out of courtesy to that person.

Q. Are you indicating that there was something -- that personnel action forms included anything besides routine transfers?

A. Everything that is done for purposes of issuing a pay warrant. Otherwise, you're guilty of a gift of public funds. It must be covered by a personnel action form.

Now, you're probably referring to the fact that the end of the year we have reassignments of principals to new school assignment or we have a promotion of an assistant principal to a principal, or we might have the promotion of an assistant superintendednt to a deputy super-

intendency. Those kinds of things which are of significance in terms of impact on the community would be highlighted. Demotions or dismissals or other kinds of punitive actions, so-called, or things that could be embarrassing were not normally highlighted so that the media could pick it up and do harm to the person's reputation and character.

Q. Well, isn't it true that all administrative transfers were placed on the agenda for Board -- of the Board members?

A. Not all, no.

Q. There are -- administrative transfers were brought to the Board in executive session?

A. Oh, in closed session; that is correct. That's right.

Q. Are administrative transfers?

A. All assignments or reassignments of administrators, right, from, I guess, vice-principal up.

Q. And that all -- well, I believe the regulations state that all administrative transfers are to go to the Board.

A. They do.

Q. And that personnel action forms are routine action forms that don't involve administrators. Isn't that true?

A. No, Miss Fisher. You're incorrect there, because when I was hired as superintendent, even though that wasn't hired on the Board agenda, that was a personnel action form that gives the county auditor, the county superintendent, and our comptroller or budget officer the authority to write a paycheck to Tom Goodman for superintendent.

Q. Well, there's a personnel action form for all personnel action --

A. Everything. Right. Correct.

Q. -- But the -- what's called "personnel action forms," is, like, a pile of personnel actions that are not dealt with individually by the Board; they're so routine that the Board votes on them without ever considering them, right?

A. Well, the Board votes on them. As I said, they're available for Board review. Most of them would be change of salary or change of assignment, change of hours, change of duties.

Q. Why do they call them "personnet action forms"? I mean, why are they treated in a bunch like that?

A. Well, because I didn't thing the Board wanted to bring up 200 items and vote on each and every one of them. If -- if the assistant cafeteria manager were reassigned to head -- the head cafeteria manager, that's something that Board members don't usually delve

into.

Q. Well, I mean, isn't it true that that's -- that's just a way of -- of handling a lot of business, a lot of routine business?

A. Can be.

Q. It's not -- it's not meant -- I mean, it's not meant to -- as a way of handle -- of dealing with controversial transfers?

A. Well, all I can repeat is that for every action taken regarding a person who is an employee of a public entity there must be a following personnel action form in order to authorized issuance of a pay warrant, and it wouldn't matter whether it was a major reassignment or a minor reassignment, if it were a sensitive personnesmatter, it all would be covered by a personnel action form.

Q. Can you list any case -- I mean, any example of a personnel action form that was controversial in nation -- in nature that was put in among this big pile of action forms and not brought to the attention of the Board?

A. No, Miss Fisher. I suggest that you name them if you have them. You, again, were a member of the Board, one of five. You brought this to the Board's attention and the public's attention, the teachers' attention, my attention, the attorneys' attention, and nobody

rescinded the action that was taken. It's so far ago I couldn't tell you what Mr. Guffin did or what he did after the action was taken.

Q. All right. Dr. Goodman, do you think in -- in general that it would be proper conduct on your part to place a controversial transfer of an administrator in among a pile of transfers that the Board doesn't see?

A. It wouldn't be improper. If the Board said: Hey, we've done enough. We've talked with this individual in closed session. We've told that individual that we know this is embarrassing, we know you don't want to take a pay cut, we know you don't want this highlighted; we'll put it through on a routine basis. We've voted initially here to do that action. We'll have your action form among the personnel action forms at Tuesday's meeting. So be it.

Q. Did you ever -- well, I want to ask you: did you tell that to the Board before you placed the personnel action in among the --

A. Mrs. Fisher, I can't recall. I told you I can't even remember what Mr. Guffin did before the action was taken, and I couldn't tell you what he did after, nor what he's doing now. That was a long time ago.

Q. Well, isn't it true that -- that Mr. Guffin's transfer and demotion

was placed -- he was an administrator, and it was placed in among --

A. Could you tell me what he was?

Q. He was an administrator. He was represented by the Administration Association, wasn't he? Mr. Gary, didn't he represent him as his counsel?

A. I don't know. But administrators can range from anything to an administrative assistant to superintendent, and there were about 450 administrators in the San Diego City Schools. I'm trying to get you to help refresh my memory. I didn't know that I was on trial about Mr. Guffin; but if you can help me, I'll try.

Q. Well, Mr. Goodman, I'm just asking if it is not true that Mr. Guffin's transfer was placed among administrative action forms without the knowledge of the Board, and it was a controversial transfer.

A. That was you allegation, Mrs.-Fisher; and, as I say, there were four other Board members, any one or all of whom could have voted to undo my alleged illegal action, and they didn't do it. I just have to live on history.

MR. IRWIN: Your honor, I'm going to object to the continuing of this line of inquiry. I just don't see where it has anything to do with this lawsuit, and it's time comsuming and apparently invloves some

personal dispute between Mrs. Fisher and Dr. Goodman about a single event that occurred years ago.

THE COURT: Well, apparently it's part of this disputed conversation. I don't know what Mrs. Fisher is going to say when she gets on the stand, but I'm going to let her go on, because my efforts at shortening it are simply prolonging the time.

MR. IRWIN: Excuse me, you honor.

THE COURT: You're overruled.

MR. IRWIN: I would like, at least, to have what her question means when she continues using the term, quote, "controversial transfer," unquote. I have no idea what she means by that. Controversial to her?

THE COURT: I think she means a transfer that someone didn't agree with.
Go ahead with your questioning. Try to bring it to a close sometime because we've got to proceed to other isues here. Go ahead.

Q. All right. I think the point that you're making is that -- that this did ultimately come to the Board of Education's attention during a closed hearing.

A. Every employee has a right to appeal.

Q. And that the Board of Education -- the Board of Education didn't rescind it at that time, right?

A. (No audible response.)

Q. All right. That's -- that was not the nature of the --

A. I don't know when it came to the Board. I believe you're correct, it did come to the Board on a appeal and in a closed session, and that appeal could have come before the action was taken or it could have come afterwards, but --

Q. Well, I believe --

A. And, incidentally, any employee union or association will happily represent an employee who has a appeal. That's their role, is to defend the employee.

Q. Okay. Dr. Goodman, my statement was very simple. The statement that -- that I made on that Tuesday and I think other times, it was that Mr. Guffin's transfer was a controversial transfer and it was hidden from the Board, was placed among employee action forms.

Now, if you -- say, if you applied -- or sought out somebody, you know, who was impartial to take that statement and show that it's not true, would it be difficult to do? How would somebody show that, whether a statement -- whether an adminsitrator transfer was placed among the personnel action forms or not? Do you know how you would do it?

A. I am not sure I understand your question. I guess, if I were you,

I would go and ask somebody who was in the School District what they now do or did do then.

Q. Well, if you --

Q. You --

Q. If you ask somebody who was objective to take this statement and say, you know, that Mr. Guffin's transfer was placed in the Employee Action forms, could that person -- I want to ask you, couldn't that person go to the -- to the recorder of the -- I guess you call it the Secretary of the Board and ask to look at the minutes of the Board or ask to hear the tape recording of the Board? Isn't it true that at each Board meeting when an employee action forms are voted on, then -- then the secretary reads -- she says: employee action forms number such-and-such.

A. The numbers are read, yes.

Q. The numbers are read?

A. They were. I don't know what they do now.

Q. Okay. Would there be some record? Wouldn't there be a record? You say tht there has to be a record in order for warrants and all. Wouldn't there be a record of this transfer and demotion?

A. Oh, I presume there would be.

Q. Well, in order to show that I

was wrong, it would take no more - isn't this true? - than for somebody to get the record of his transfer and then go and check to see if it's among the employee action forms, right?

A. That could be.

Q. Then it wuoldn't be a difficult thing to disprove?

A. For whom to disprove?

Q. Well, for anybody to show -- if I say tht his transfer was placed among the employee action forms--

A. Uh-huh.

Q. -- and somebody else wants to show that I'm lying, they could do it very easily, couldn't they?

A. I guess whoever "they" is, they could, yes.

Q. Well, did you ever attempt to?

A. No.

Q. You said that my charges that these -- these charges were false. Did you not?

A. I said your charges were false; that is correct.

Q. All right. And my charge was --

A. And my role as superintendent is not to try to make a Board member look foolish. That's the quickest

was to get unhired as superintendent, is to make a Board member look foolish.

Q. Well, you don't believe that saying that a Board member made a false charge is making a Board member look foolish?

A. I believe you made a false charge, because four other Board members didn't pick up on your charge, nor did the teachers' unions, nor did the Administrators' Association, as you say, other than representing the person, and they didn't get a positive vote from the Board.

Q. Dr. Goodman, is there a distinction in your mind between whether the statement that I made that Mr. Guffin's transfer was put in the personnnel action forms, whether that is false -- is there a distinction between that and whether the Board decided to do something about it once they found out?

A. No, because I realize your charge, quote, "demoting an administrator without the Board's knowledge of this action," end of quotes. As I told you before --

Q. Well isn't it true that the transfer -- that when there is a transfer, as soon as the transfer is acted upon the administrator is demoted?

A. Well, that's a difficult ques-

tion. No. The Board may say, "We agree to demote the administrator as of next Janusry 1st," and take the action today, July 13th.

Q. Well, isn't it true that when Mr. Guffin had his hearing it was after the fact of his demotion?

A. I couldn't tell you that. Your recollection, apparently, is much better about this one item than mine. It wasn't that significant an item. I'm very sympathetic to all employees, but I have the responsibility for recommending hiring, firing, and demotion, promotion for thousands of people; and it's very difficult to remember each and every day, and I've never had a demotion yet that wasn't considered controversial in the eyes of the person being demoted.

Q. Well, Dr. Goodman, I'm just trying to -- all right. I don't want to go on too much longer in this. I'm just -- just -- okay.
You said that you never asked somebody to make that check. You did say that this accusation was false, right?

A. (No audible response.)

Q. Did you ever --

A. Your accusation?

Q. You said that my accusation that his transfer was put in among the personnel action forms was false?

A. No, No, No. You said we demoted an adminsitrator without the Board's knowledge, quote, unquote.

Q. Well, what is -- do you think that -- that putting a demotion of an administrator among personnnel action forms that the Board votes on that doesn't look at would be voting -- would be putting through an action without the Board's knowledge?

THE COURT: Well, I don't believe I follow that. Are you asking him if -- if your Board votes on something it doesn't know about?

MS. FISHER: Aren't they voting without their knowledge?

THE COURT: Is that your question?

MS. FISHER: Yeah.

THE COURT: Well, you needn't answer that question.

I've been playing here with some exhibits. Is this the case of an individual that was -- whose deomition to a teaching assignment came before the Board and was approved by the Board?

MS. FISHER: No, you Honor. It was a demotion without the Board's knowledge of their action.

THE COURT: Well, I'm asking you if it's the one that Dr. Smith was speaking about in his statement. Is that the case?

MS. FISHER: That Dr. Smith was speaking about?

THE COURT: Yes. Was this situation upheld by the Board after a hearing requested by the demoted person?

MS. FISHER: Yes, I think that --

THE COURT: Well, what are we talking about?

MS. FISHER: Well, your Honor, I believe that my -- that my accusation was that -- that this action was hidden from the Board. It was a demotion that was hidden from the Board.

THE COURT: If the Board acted on it --

MS. FISHER: The Board did not act on it until -- I mean, the Board didn't even know it occurred until some months later, at which time there was a hearing.

THE COURT: Well, what was the result of the hearing?

MS. FISHER: The result of the hearing was that the Board decided not to make an issue of it.

THE COURT: In other word, they upheld the -- whatever action was taken. So it seems to me we're spending a lot of time on something the Board has, in effect, given approval to, aren't we?

MS. FISHER: No. I don't think

that. I think that --

THE COURT: Well, we spent a whole afternoon now on issues that have -- I have difficulty relating to the three charges of defamation that your're suing on. This man has told us all about the procedure for handling these demotions or reassignments. We now learn that the demotion, or whatever it might have been, was approved by the Board after a hearing even if the Board didn't know what it was doing, it approved it. I don't see why we can go back on that to the superintendent. If you've got other questions on this subject, let's get to them so we can go to another subject.

Q. All right. Did Mrs. Larsen or anybody that you associated with the Larsen campaign ever -- ever ask you for any details, or do you know if they ever asked anybody for any details on ths matter?

A. Not to my knowledge.

Q. Oh. Okay, let's go to the last one. That was the children's center supervisor's, Thelma Johnson. do you remember Thelma Johnson?

A. I remember the name now that you name it, yes.

Q. Well, can you recall anything concerning her transfer and demotion?

A. Now much. It's been a long time ago, and she was one of many, many,

many employees. I believe that there were some concerns about budget and bookkeeping and attendance and collection of free and reduced-priced meals and so forth. Ultimately, the person was reassigned to some other capacity, I believe.

Q. Okay.

A. The Board discussed it in closed session several times, and it was even appealed by the head of the teachers' association, Mr. Boitano; and subsequent to that, the Board sustained our recommendation as a administration and did whatever they did to -- for Mrs. Johnson. I couldn't tell you where she went or to what job, but it was after a thorough investigation and thorough rehearing.

Q. Okay. Isn't it true that -- Okay. Mrs. Johnson was transferred and demoted and that she asked for a mediary or an arbitrator or an outside person to come in and give an advisory ruling to the Board and examine it?

A. That could be. That was in your procedures in the District, that if you disagreed with the decision of the superintendent, and ultimately the Board -- if the Board supported the Superintendent, I believe there was advisory arbitration available for an employee who either felt that the contract was not followed or an action was not proper.

Q. Can you recall the decision of

the arbitrator in that matter?

A. I can't exactly. It could have been the arbitrator supported the district's actions or opposed it. I couldn't tell you. I believe, though, the Board supported the action that we recommended.

Q. Okay. Do you recall now your saying that my statement about this was -- false, right? Isn't that what you said? Do you recall what my statement was?

A. Not without looking back in the newspaper or your deposition or my deposition. All I'm saying --

Q. Wasn't it true that my statement was that -- that Mrs. Johnson was transferred and demoted and she called in a arbitrator, and the arbitrator gave a ruling in her favor that was really a very damning of the -- of the consideration for her rights shown by the District: I mean, isn't that all I said, that -- that Mrs. Johnson -- ther was a mediation or an arbitration and that the arbitrator issued a written report and it was in favor of the employee?

A. I don't --

Q. And that the Board, at the recommendation of the Superintendent, overruled the arbitrator; and they -- they sustained the transfer and the demotion?

A. Arbitrator, under advisory

arbitrating, only advises the Board, doesn't overrule. The Board's action is final unless the person appeals to the court, the Superior Court, and then that's where the next step goes.

Q. Well, what -- I mean, can you recall that I said any more than that, that -- that she called in an arbitrator and that the arbitrator ruled in her -- her favor and that the Board -- Board didn't abide by the ruling?

A. I only recall that, as with all other issues in which I was involved, you made a big issue of it and you went on and on in the media and public meetings and private meetings and so forth in which I was in attendance. That's the most I can recall at this time. That was eight or nine years ago, I guess.

Q. Well, when an arbitrator is called in and the arbitrator makes a written report, isn't that on file? Isn't that kept?

A. I suppose so. I am not an arbitrator. There is a statement, mediation decision, so far as -- and there's a P.E.R.B. and there's and A.A.A. I'm sure somebody keeps records. We have to keep records in public service.

Q. Well, would it be difficult for somebody, if they wanted to prove or disprove that an arbitrator -- I mean, my statement that the arbitrator looked at the situation and

ruled in the employee's favor, couldn't they just go to the District and ask for the report?

A. Well, your feelings wouldn't be included in the report. All that could be included in the arbitrator's report is his or her opinion, and that's all it would be, an opinion.

Q. Well, can you recall what it was that I said, what was that the --

A. I can't at this time, Mrs. Fisher. It's been so long ago and you said so many things about me and to me and for me. Seriously, I really --

Q. Well, All right, Dr. Goodman --

A. I have my notes here. I'm reading from the chronology which you've brought up here, and I'm quoting here that one of the four charges, quote: Recommending dismissal of the children's center supervisor on a personal vendetta basis, period, end of quote.

What prompted me to say that at that time, I don't know. Probably if I had a chance to go back and look at newspaper clippings, interviews with media, interviews with employee groups, interviews with other Board members, I might find out why I said that.

Q. Well, now you're saying that this came up in a meeting that we had on Sunday, right?

A. It was one of the things you

brought up.

Q. And you're also saying it's your contention that -- that I -- on Tuesday that I made accusations like this, that I threatened to do on Sunday. Is that what you're saying?

THE WITNESS: Well, Your Honor, if I could have those notes back that you introduced or she introduced - excuse me, Mrs. Fisher - I could tell you what I said then.

Q. All right. Did you ever listen to --

THE COURT: Wait a minute. He's going to answer your question.

MR. IRWIN: May I approach the witness, Your Honor?

THE COURT: Yes.

MR. IRWIN: Let the record show I'm handing the witness Exhibit 5, which is admitted into evidence, Exhibit 6 still for identification.

THE COURT: All right. Very well.

THE WITNESS: Go ahead.

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THE COURT: Put your question again, please.

MS. FISHER: Well, Your Honor, what we're -- what we're talking about is -- is that speech in which Mrs. Larsen accused me of threatening

the superintendent, threatening to make accusations.

THE COURT: We know that.

MS. FISHER: I'm trying to get at what the accusation was, what was the -- I mean, the accusation.

THE COURT: Well, he's just said here something about firing somebody because of a personal vendetta.
Do you remember any more than that?

THE WITNESS: No, sir. I only recall Mrs. Fisher disagreed with the action of the Board, disagreed with out recommendation based on our investigation. She assumed -- I guess she assumed the arbitrator was correct. We assumed the arbitrator was not correct. Just as --

BY MS. FISHER: Q. Okay. Did you ever hear the tape recording of the Tuesday meeting that --

MR. IRWIN: Excuse me. What Tuesday meeting?

THE COURT: This must be the Board of the School District.

MS. FISHER: Well, this -- this -- this speech is supposed to center around statements that I made at the end of the -- the Tuesday -- or I guess the meeting ended abruptly -- of a Tuesday meeting, and it said that I threatened to make some accusations and then I turned around and carried out that threat.

Q. Did you ever -- did you ever listen to the tape of that meeting?

A. I don't recall whether I did or didn't, Miss Fisher. I did read the newspapers the next day which reported at great length your charges.

Q. Well, did --

A. And your call for my resignation.

Q. Did the newspaper say that I -- that I had said that you recommended the dismissal of a children's center supervisor on a personal vendetta basis?

A. No. What you're reading here is what I wrote down as my recollections of the events and the charges you made on that Sunday and, after that, probably at the meeting, as reported to me by the reporters who stayed for the meeting and as reported by the newspapers the next day.

Q. Well, what -- what do you recall was the nature of -- of whatever I said about this particular item?

A. I don't know, except I guess as I -- the way you usually responded was if I didn't agree with you or with an arbitrator or a lawyer or a judge that I was wrong and , therefore, it was a personal vendetta if I stuck by my opinion.

Q. Well, what do you think -- is

that what you said -- just what you said I said during the meeting -- what was it that I said regarding Mrs. Johnson during the meeting that Mrs. Larsen in numerous statements has said was false and you've said was false? What is it that's false?

A. Mrs. Fisher, I don't carry personal vendettas. I have never made a recommendation to a board to hire, fire, demote, promote, reassign, unassign any employee on a personal vendetta basis; and yet, you -- every time you disagreed with me on any item I was either unethical, illegal, felonious, malicious, personal vendetta. You just happen to disagree with me and, you know, people can disagree agreeable. you can't with me.

Q. Well, did -- did -- is it your understanding that I said that that was the nature of my accusation, that I said Dr. Goodman -- well, in this working, that "Dr. Goodman recommended dismissal of a children's center supervisor on a personal vendetta basis?

A. That's what I wrote down in 1977 in doing thuis chronology.

Q. Well, is that your understanding of what I said on that Tuesday?

A. I don"t know whether it was my understanding of then or the previous Sunday or the following Monday or Tuesday. I don't really know, Miss Fisher. You said so

many things, you know; when you put this together a week or two weeks, a few days or many days later, there may have been many things that led me to believe that. I just wrote it, you know, and you have the document. You've introduced it.

Q. Well, if you -- if you said or somebody has gotten indirectly from you some information that -- that supposedly says that I made a threat to say something and then I turned around and said it, you know, you know, that -- you know, I don't -- I never said that.

But did you ever -- did you ever hear the tape recording about what was said about Mrs. Johnson?

A. I don't recall. I don't really know whether I did or didn't.

Q. Did you ever ask for a transcript of the --

A. I don't know that I did. I was so used to your charges, you know, why should I dredge up more misery?

Q. Well, if I -- if I -- you know, if you looked at the transcript and it said that -- on the transcript it said, well, that -- that there was a transfer and demotion of Thelma Johnson and a mediator was called in and a mediator gave a scathing attack on the District's procedures and the Board, on the advice of the Superintendent okayed the procedure, something like that, would that be -- would that be false?

A. Are you telling me there's something that actually exists or did happen, or are you asking me for a hypothetical?

Q. No. I'm -- well, I'm telling you it actually exists and it did happen. Is that false?

A. Is what false?

Q. Statement. Is the statement that -- okay. Mrs. Johnson was transferred and demoted. She had a mediator come in and the mediator --

A. Arbitrator.

Q. -- was very critical of the District and recommended that the transfer be rescinded; but the Board of Education, on the recommendation of the Superintendent, did not rescind it. Is that false?

A. Is what false?

THE COURT: Oh, I think what we're getting at is assuming that all of this actually occurred. Dr. Goodman, just assume that for the purpose of the question. Is her relation of the factual truth correct or incorrect? And I think the answer is quite obviously it's correct.

THE WITNESS: That's correct.

THE COURT: I don't know what we're getting at here, Mrs. Fisher. The charges on which you're suing the defendants do not include this

particular charge, do they?

MS. FISHER: Well, yes, they do.

THE COURT: They do not, because I just read them. Show me where they are in here.

MS. FISHER: It say, "We watched her as she leveled a series of scurrilous charges against the Superintendent of Schools."

THE COURT: Yes. They're not specified, are they?

MS. FISHER: The scurrilous charges were these four charges that -- the misappropriation of funds, the aid to A.D.A., Guffin, and Thelma Johnson. I'm just trying to --

THE COURT: But the scurrilous charge would be that Goodman had done something that he shouldn't have done. Now, we're not trying Mrs. Johnson or wahtever her neme is. We're trying, apparently, Dr. Goodman here. Now --

MS. FIHSER: NO --

THE COURT: -- He says that you said: Id you don't follow my instructions on these four matters and go along with the teachers' strike settlement, I'll get you and do bad things to you. That's what he -- that's the scurrilous charge they're talking about, not whether or not these people were correctly fired or whatever happened to them.

MS. FISHER: I don't believe that that's -- that that's -- the scurrilous charges, you honor, were -- were the charges of, you know, relating to the development, developers' funds, relating to the A.D.A. They were the actual informational content that we've been discussing here; and this is -- this is -- I think that -- that you'll see that if you look at some of the earlier articles where Mrs. -- Mrs. Larsen said I made false charges against the Superintendent.

THE COURT: Yes.

MS. FISHER: And the developers' funds, the school account, the transfer of Mrs. Johnson were supposedly the false charges that were later termed "scurrilous charges."

THE COURT: Well, what is it you want to do at this moment? We're down to the last of these.
What is it?

MR. IRWIN: Well, your honor, I think part of the problem is that Dr. Goodman, as I understand his testimony, because the witness (sic) constantly asks him what did she say on Tuesday and are there minutes that -- Dr. Goodman testified that the meeting was abruptly adjourned by Reverend Smith and that he and the staff left the meeting and were not present, you know, as far as he personally was concerned, to hear what she said;

but he read it in the newspapers and heard it from the reporters later.

THE COURT: I don't think that's out immediate problem.

MS. FISHER: Well --

THE COURT: She's attempting to get Goodman to explain that if her version of this firing episode was correctly reported, then there was no falsity, although it seems to answer itself.

But you've lost me. Is your question, your hypothetical question to this man, as I indicated; that is, that the proper procedures were taken, properly reported, there was no falsity in the report? Is that your question?

MS. FISHER: There was no falsity in my report of what happened.

THE COURT: All right.

MS. FISHER: I think that -- that a good deal of what I'm trying to show is that this is a relatively -- a relatively simple matter that would not be difficult for somebody to check.

Q. First of all, isn't it true that -- that there is a tape recording of every Board of Education meeting?

A. There is supposed to be, yes.

Q. So if somebody wanted to check and see what I said at a particular

meeting, it would just take a few minutes, really, wouldn't it?

A. It would take as long as your statement went, yes.

Q. Okay. There's a very -- you know, a very cooperative staff that would get the tape, and they'll put it on and enable you to hear the tape. There's somebody that's there all the time and who has charge of that. Then, if they listened to the tape and they found the words that I said and they wished to show or determine whether it was true or not, then to find out whether a mediator -- whether there was a mediator called in a particular case would not be that big of a job, would it?

A. I guess not.

Q. Okay. Now, did Mrs. Larsen or anybody associated with the Larsen campaign, to your knowledge, ever attempt to do that?

A. Not to my knowledge, because I didn't run her campaign and I wasn't involved in her campaign.

Q. But you have no knowledge of anybody trying to determine whether this was true or false, right?

A. Not to my knowledge, other than you by your charges. (VII R.T. 377--391)

Testimony of Thomas Goodman:

Q. Mrs. Fisher asked you some questions on the other two matters which, as I understand it, are issues relating to school employees or personnel matters?

A. Yes, sir.

Q. And one gentleman - I can't think of his name - involved either a demotion or a transfer that might be considered such?

A. Mr. Guffin.

Q. Yes, sir. I'm sorry. Mr. Guffin. And that, you say, was investigated?

A. Yes, sir.

Q. And the finding was that there was nothing improper in the handling of his employment?

A. That's my recollection, yes.

Q. This information came back to the board after Mrs. Fisher's charges?

A. Yes. It would have to be responded to.

Q. To you best recollection, was there ever a member of the San Diego School Board other than Mrs. Fisher that supported Mrs.-Fisher's contentions in regard to that gentleman?

A. No, sir. Not to my recollection.
Q. All right. The next one was a Thelma Johnson who worked as a Children's Center supervisor, I believe.

A. Yes, sir.

Q. Now, Mrs. Fisher has indicated that after a Board action that Mrs. Johnson requested, as I understand it, arbitration was recommended by a lawyer and there was a hearing.

A. Yes, sir. A state hearing officer, I believe, arbitrator.

Q. All right, and his recommendation, as I understand it, is advisory to the Board?

A. That's correct.

Q. And am I correct that the Board rejected his recommendation?

A. Yes.

Q. Now, in addition to that, do you recall if thereafter the matter was taken to the Superior Court to determine whether the position of the Board in regard to Mrs. Johnson was right or not?
A. Yes. I believe it was appealed to the Superior Court, and the Superior Court upheld the District's action, the Board's support of the action against Thelma Johnson.

Q. All right. So the court sustained the Board's rejection of the arbitrator's recommendation and

that the Board position was proper?

A. Yes, sir.

Q. Other than Mrs. Fisher, to your knowledge, was there ever anybody who was a member of the School Board, San Diego Unified School District Board, that supported Mrs. Fisher in her allegations about an alleged impropriety in the handling of this woman's employment?

A. Not to my recollection. I can't tell you the exact vote on the Johnson measure, but I don't -- anyhow, the Board upheld our recommendation, as I say, after the arbitrator made an advisory recommendation. And it went to the Superior Court, and it was sustained. (VIII R.T. 509-510)

Larsen Defendants' brief:

Board member Dorothea Edmiston testified that no violations of personnel policies had occurred. (XVII R.T. 1932)

The testimony:

Q. Did you ever -- did it ever come to your attention, or did you ever feel as a Board member and president of the Board that Thomas Goodman had violated district policies with respect to personnel matters?

A. No. I have no reason to think he did. (XVII R.T. 1932)

Larsen Defendants' brief:

> Board President George Walker Smith testified that the charge against Superintendent Goodman of violating personnel policies was false. (XVIII R.T. 2043-2044; Exhibit H.)

The testimony:

> Q. The third charge she made was relating to, I think, a demotion of a Thelma Johnson.
>
> A. I know her personally.
>
> Q. And what do you know about that event and Mrs. Fisher's charges?
>
> A. Well, not only did I rely upon the school administration's assessment of Thelma, but some folks that I know personally I contacted, and I felt that the District was justified in what it did.
>
> Q. So you had an investigation of your own, as well as from the school staff?
>
> A. Knowing them as I did, I would have been the one hollering the loudest if I felt she was being dealt with unjustly.
>
> Q. Why?
>
> A. Simply because, first, she's a black woman. Secondly, because being from my community and representative of District 'E' it would be my rsponsibility to make sure that she got justice.

Q. In other words, she resided in the district that you represented?

A. Right.

Q. And you were satisfied that the action --

A. I was satisfied.

Q. -- was correct. Is that right?

A. Yes.

Q. The fourth charge she made related to a transfer of -- I think it was a transfer, or at least a personnel matter related to Mr. Guffin, who was an auto shop instructor.

A. That's right. That's true.

Q. And were you aware of that previously?

A. We discussed his situation in executive session.

Q. Now, I think that the charge that Mrs. Fisher had made is that the personnel action in regard to thaat gentleman was concealed from the Board by Dr. Goodman so that they voted on it without knowing what they voted on.

A. I have no knowledge of that, and I know I did not vote having no knowledge about it.

Q. All right. Now, based on the period of time that you served on the school board, for sixteen

years, and your four years as president, did you have many occasions to deal with the reporters who were assigned to cover educational activities of the district?

A. Oh, definitely so.

Q. And did you form an opinion in your meetings with these reporters as to their investigative ability and their following through in making investigations before they made quotations or wrote stories about it?

A. Being there for sixteen years, I had a chance to get to know a lot of the reporters: Michael Scott--Blair, Margery Craig, Don Coleman. I found them to be very very responsible reporters. I could be visiting my mother in Alabama; and if they were going to quote me on something, they would call to make sure that the quote was correct. I found them to be very responsible. (XVIII R.T. 2043-2044)

Larsen Defendants' brief:

> In short numerous witnesses testified that FISHER's charges against Superintendent Goodman were false. This evidence supports the jury's finding that the LARSEN campaign statement was true.

2. BRIBERY

For both the bribery and the blackmail statements there is a difference between what

defendants say they intended to convey and the the libelous connotation.

Yvonne Larsen's testimony:

> Q. You said -- what was your reaction when you first read this statement: "She told the superintendent that if he agreed to collaborate with the teachers' union, she would see to it that he would gain such a good reputation he could name his job anywhere in the country."
>
> A. (No audible response.)
>
> Q. When you first read it, what was -- did you think? What is your first reaction?
>
> A. Well, we all knew that you were eager to have him find a new job.
>
> Q. Well, what did you think that was saying?
>
> A. It was saying you'd be delighted if he was offered another job somewhere else and we had a new superintendent.
>
> Q. Is that all it's saying?
>
> A. I think so.
>
> Q. Do you think -- when you say: "She told the superintendent if he agreed to collaborate with the teachers' union --
>
> A. Uh-huh.

A. -- she would see to it he would gain such a good reputation he would -- he could name his job anywhere in the country --" Do you think that that's equivalent to saying, you know, "She'd like to see him go somewhere else"?

A. Yes. You wanted him to go somewhere else.

Q. But there's no more to that statement?

A. No unh-unh. (R.T. 1136, l. 18 - 1138, l. 11)

Q. Okay. But when you -- I mean, when you take a statement from Mr. Goodman's chronology: "If you'll support my plan, you'll get such a good reputation you can name your job anywhere in the nation and we'd both be happy --

A. Uh-huh.

Q. And you take that and you put in a speech: "She told the superintendent if he agreed to collaborate with the teachers' union, she would see to it he would gain such a good reputation he could name his job anywhere in the country -- I mean, isn't -- aren't those two completely different statements?

A. No. I think that there are ramifications and some intertwining that makes it a reasonable statement. (R.T. 1139, l. 11 - 25)

Q. But if you assume that that is -- that that is -- you know, that I had said, you know, "If you support my integration plan," don't you think that -- that you're conveying a falsehood when you take that and you translate it to saying that, "She told the superintendent if he agreed to collaborate with the teachers' union"?

A. No.

Q. You don't think translating it from "I'll support your -- if you support my integration plan," to, "if he agreed to collaborate with the teachers' union," is a false translation?

A. No. These are happening at the same time, and there is some interconnection, as I've already testified.

Q. But you really -- what you really meant to convey was that I wanted to see him gone, right?

A. You wanted to se him gone, yes. That was a known fact. (R.T. 1140 l. 3 - 19)

Q. Now, when you say, "The superintendent refused to go along with what was almost a form of bribery," What's the bribery?

A. You were offering him carrot cake.

Q. Carrot cake?

Q. Okay. I was offering him -- I was offering him his job anywhere in the country; is that it?

A. You were trying to make a deal.

Q. And what was the deal?

A. "You do something, well I'll do something." You were trying to negotiate, to come up with a -- a deal.

Q. Yeah. I was making a deal. "You collaborate with the teachers' union, and I'll get you any job you want," right?

A. Uh-huh. Right. (R.T. 1141, l. 10 - 14; l. 21 - 1142, l. 2)

There was no evidence whatsoever to support the bribery statement. Fisher denied it. Goodman's notes contained his version , "Your support my Raise (trimester, opt-out, integration) plan and you'll have a national reputation so that you can name your job anywhere in the country -- and we'll both be happy" (exhibit 5). Goodman testified,

Q. But they (teachers union) never supported my (integration) plan, did they?

A. I don't know what they did with

regard to your plan. I don't really recall. I don't remember anybody much supporting your plan.

Q. Okay. Nobody supported my plan?

A. Apparently.

Q. Okay. But there -- I mean, it wasn't -- my integration plan didn't have anything to do with the -- with the teachers' negotiations?

A. Well, it seemed to be, because you told me that unless we had good will from the teachers, namely, give into all their demands that the teachers' union was promoting, and that we would never get teacher involvement and support of an integration plan. You dumped the whole load on me at one time.

Q. Well, do you consider that what you said here, that I said: Well, if you support my R.A.I.S.E. plan, you're going to get such a great reputation -- do you think that that is equivalent to saying that: she told the superintendent if he agreed to collaborate with the teachers' union?

A. Those are Mrs. Larsen's words, not mine. I didn't write them. I didn't suggest them.

Q. And you didn't provide any basis for them; is that right?

A. Not to my knowledge. (R.T. 406, l. 12 - 407, l. 8)

All the testimony agrees that Fisher's integration plan was not related to or supported by the teachers' union, and that it had nothing to do with negotiation items discussed on Sunday before the strike. (Goodman R.T 300, l. 6 - 17,)

Witt testified,

> Q. Okay. Can you -- can you recall that just before the strike -- you said that you felt that I was trying to bring the sides together. Did I ever say anything about integration plans to do with that?
>
> A. I don't remember you referencing the integration plans as a function of trying to bring the sides together on the strike.
>
> A. What I'm trying to point out is they're just completely different subjects.
>
> A. I would say so. (R.T. 232, l. 20 - 233, l. 1)

3. BLACKMAIL

There is a difference between the libelous connotation and what defendants said they intended to convey.

> Q. Okay. What is the blackmail?

A. It is a coercion where you were trying to bring about a result by negotiating a deal.

Q. Well, can you be a little bit more detailed? Was it --

A. You were trying to coerce the superintendent into accepting your point of view and, therefore, you would give him great accolades, write him a glowing letter of recommendation, et cetera, to try and get him a job somewhere else and give him a --

Q. So --

A. A --

Q. Okay. The blackmail was "If you collaborate with the teachers' union, I'll get you a job," right? I thought that was the bribery.

A. There -- I think bribery, blackmail, coercion, threats, they're intertwined. (R.T. 1142, l. 18 - 1143, l. 6)

Q. All right. Now, isn't it true that in Mr. Goodman's chronology when he listed these four items that he said, "This is all old hat. That's all stuff that's come up before"?

A. Yes.

Q. All right. Now, what you have in your statement is: "But if he

> refused" -- right after the "collaborate with teachers' union." -- "she would get him. She would accuse him of many things and call for his resignation. Doesn't that imply that I'm making some -- some new accusations or something?
>
> A. Not necessarily, no. (R.T. 1140 l. 20 - 1141, l. 4)

The testimony of Fisher and Goodman differ as to what was said during the Sunday meeting. Goodman said she threatened him; Fisher said she didn't. However, even if absolutely no credance is given to Fisher's testimony, there is no dispute as to what she supposedly threatened with -- items that had been previously aired in the presence of the press during public Board meetings. Goodman's notes and his testimony emphasize that the 'charges' had been publicly aired before and that the Board had not repremanded him. Each of the items mentioned by Fisher on Tuesday (exhibit 18) includes some reference to the fact that the Board had knowledge of the matter and went along with it. Even Yvonne

Larsen agreed that the charges were 'old hat'. She testified,

> Q. (Referring to the blackmail speech) You didn't have any -- did the wording -- did you have any impression about the wording or any of those -- (pause)
>
> A. I was uncomfortable with the word "obfuscation." It was not a common word in my vocabulary at that point in time; and the words "blackmail" or "coercion," I thought either could be interchanged. Other than that, I thought the "scurrilous charges," they were abusive charges; and I think this is a matter of record that you were somewhat abusive to the superintendent in continuing to agitate these issues that had been resolved long before by a variety of different groups who had reviewed the materials. You did not want to believe that these were resolved. Yet, they had been resolved to our group's satisfaction. (R.T. 1127 l. 20 - 1128, l. 5)

4. STRIKE

The strike statement in the Special Verdict Issue 15 reads,

> "The strike -- by any standard -- was illegal. In my opinion, it also was immoral. And my opponent was associated with it every step of the way."

Defendants do not contend that plaintiff

supported the strike action or that she supported the teachers' defiance of the court orders to return to work. Yvonne Larsen testified,

> Q. What's your -- well, let's go on. "This shameful action by my opponent which presaged the illegal strike..." And then you quote the statement by Judge Lazar: "The shameful blot on the history of the teaching profession ...instituted to use its disruptive effect on the process of the children".. and .." the children were exploited as hostages"...and..."the strike was illegal and, also immoral". "And my opponent was associated with it every step of the way." Well, did you intend to convey that -- that -- that I was trying to -- that I was favoring the strike?
>
> A. No.
>
> Q. What did you intend to convey?
>
> A. That you were supportive of striking teachers, that your sympathy gave them an additional feeling of possible authority and/or power.
>
> Q. Well, why didn't you say that in those words, rather than using these words?
>
> A. I don't see any difference, really, with them. You were associated with the -- the activities

of the strike, as known by your public record.

Q. Well, do you think that -- that saying that my activities gave the teachers hope is the same as saying -- and in that way: I was associated with the strike, is the same as saying that the strike was instituted for its disruptive effect on the children and the children were exploited as hostages, and it was illegal and immoral, "and my opponent was associated every step of the way"? Don't you think that has a different impact?

A. No. Judge Lazar said most of that.

Q. Yeah. But you're conveying it, aren't you?

A. I have restated it. (R.T. 143, l. 7 - 144, l. 12)

Q. (Referring to exhibit 15, Yvonne Larsen's campaign brochure) But it was a campaign --

A. It was a campaign brochure to present my candidacy to the people of the City of San Diego.

Q. Well, do you think that that statement about children being injured -- do you think that that I was unconcerned about the children being injured?

A. I have put this statement in here as a direct quote from the Honorable George A. Lazar, Superior

Court Judge. It was his statement, not mine. It was a public statement that was allowed to be used in this type of brochure, and I do feel the children were exploited. I agree with him, and I do agree that it was a shameful on the teaching profession in our city.

Q. Well, did you think that I was unconcerned about the injury to the children?

A. I'm sure you were concerned, but you were also a participant in some events that were very unfortunate.

Q. Okay. Did -- where it says, you know, "We all know what Fisher's position is on the strike," did you intend that to mean I supported the strike?"

A. I intended it to mean just what it says. We knew that you did not support the strike, per se, but you were sympathic with the teachers. You supported their demands. You gave them encouragement. Your positon was well-stated publicy the week of June 6th.(pg. 114, l. 20 - pg. 115, l. 16)

5. CONFIDENTIAL

The last statement in issue 15 reads,

"...she violated her public trust by passing on confidential, privileged information to the plaintiffs in the Carlin case. Superior Judge Welsh characteriszed her irrespon-

sible actions as those of a "turn-coat" and a "renegade."

A copy of the reporter's transcript of the testimony of Goodman, Fisher and Judge Welsh that pertain to this issue are included in this section.

Fisher testified that on May 5, 1975 the Board of Education formally requested that the staff prepare a report on optional zones. On October 12, 1976, in executive session, Dr. Goodman handed exhibit 8 (E-12) to board members and identified it as 'the optional zone report you requested'. She said that the schools attorney who attended all executive sessions didn't contribute to the discussion until somebody asked him what he thought about it and he said he thought the judge would be impressed especially since the board asked for it so long ago.

She said that she was in the courtroom, December 8, 1976, and heard Goodman testify. He was asked if anything came of the May

5, 1975 board's public request for an optional zone report, and he and school's attorney Stern testified that the report the board requested had never been completed. They said that there were some 'working documents' ordered by the attorney but that they couldn't be made public because they came under the attorney's work product rule. Some of that testimony was read into the record while Goodman was testifying (R.T. 484 - 490), and it was referred to during Welsh's testimony. She said that she found the report that night and brought it to the court the next day, showed it to the reporters and told them that Goodman had lied about the existence of that report, and that Melba Marçolis, who was helping the plaintiffs in the Carlin case, asked if she could have it since it was a public report, and Fisher gave it to her. She said that she met with Witt, Stern and Lincoln in the Cafeteria conference room and that Lincoln gave her the memo from Lincoln

to file (exhibit 9, E-16) that she read into the record during Welsh's testimony,

> "I explained to Patrick, who was the administrator, and Stern, who was the school's attorney, that as I understood the law no matter who did the study, this study, any documents or tangible evidence that were turned up would be available for discovery by the plaintiffs. However, if a study was done on behalf of the attorney, then perhaps we could keep the study itself out on the work product rule."

The testimony of Fisher, Goodman, Larsen and Edmiston all agreed that confidential documents provided to Board members were stamped CONFIDENTIAL. The Oct. 12 report (exhibit 8, E-12) had no such marking. Goodman testified,

> Q. Can you think of any item - let's just narrow it down - prepared by the school's attorney -- well, first of all, when -- well, okay, prepared by the school's attorney tht was given to the board that was confidential that was not marked "confidential"?
>
> A. Typically, most documents that would be sensitive or under litigation would be marked "confidential."
>
> Q. Okay. (referring to exhibit 8) This is not marked "confidential,"

is it?

A. This is a staff report. This is not an attorney's report. This is from the secondary schools division. (R.T. 478, l. 26 - 479, l. 8)

There's nothing within the report to associate it with an attorney.

The Court: I can't believe that this exhibit 8 is the report that you were accused of -- of handing to the wrong people, because that report was a communication from a lawyer, wasn't it?

Ms. Fisher: Well, I think that's the whole point, you honor, that the lawyer -- and this is why I wanted the transcript of the session. The lawyer said that he made his report look like an ongoing report for strategic reasons in that closed -- in that session.

The Court: Well, there's a misunderstanding somewhere, because the order which I have before me which is exhibit "C" speaks of other communication between counsel and client, and this thing, no. 8, is not such a communication. So I wonder if you're mistaken. (pg. 481, l.4 - 17)

Testifying about the October 12 report,

Goodman stated,

> Q. Well, do you recall that -- that the district represented to Judge Welsh and Judge Warner that this was a report prepared by an attorney's work product?
>
> A. No. I don't recall that at all. I don't know that this is the same report referred to as the attorney's work product. This would not be the way our attorney's office would write a report. They would write it as a legal document in legalese. (R.T. 488, l. 7 - 14)

Fisher's testimony, that the superintendent and attorney Stern specifically identified the report as what the Board had requested during a public meeting, was not refuted. The report itself refers to the Board's May 5, 1975 request for the study. There is no indication whatsoever that it was in any way an attorney's work product.

Defendants did not submit any evidence that the optional zone report (exhibit 8) was a confidential communication from the schools attorney to the Board, or that it was any sort of confidential document. They relied

on undisputed testimony that it was given to board members during executive session. Fisher testified that there were other violations of the executive session restrictions. Fisher and Edmiston testified that a report proposing termination of the Head Start program (exhibit 14, E-19) was discusssed and voted upon in executive session.

Edmiston testified,

> The Court: Well, now, what has this got to do with our lawsuit?
>
> Ms. Fisher: It's got to do with the executive session. She said that the district was very careful about --
>
> The Court: Yes?
>
> Ms. Fisher: -- Adhering to executive session.
>
> The Court: Are you attempting to show that ther were variations in the policy? Is that your point?
>
> Ms. Fisher: Yes.
>
> The Court: Let's get right to it. Did something happen during that discussion of the subject she mentions in which the secrecy policy was relaxed? "Yes" or "No."

The Witness: Was relaxed, no. (R.T.-2013, l. 6 - l. 19)

Q. I want to ask her if she recognized it as a -- and this pertains to the problem of -- here, (referring to exhibit 14) you take a look at it and just take a brief look at the discussion, and maybe you'll recall.

The witness: I remember it, your honor.

The Court: And see what the question is.

The witness: I remember it.

Referring to a staff recommendation to terminate the headstart program.

Q. All right. Well, wasn't that document brought into executive session and considered in executive session?

A. I don't know. It probably -- it possibly was. It's a report.

Q. Well, do you -- will you take a look at the report?

A. (complying) Yes. It no doubt was brought to executive session, because it has to do with personnel. Based on certain assessments it's proposed that the district begin now to phase out its involvement in Head Start. So that would mean laying off people. It would be a definite personnel item, so it

would come to executive session before -- because we would discuss that.

Q. Well, does it have any names of people?

A. I don't see any. I think it doesn't have. It's a statement of proposed policy, change in policy.- (R.T. 2016,l. 6 - 2017, l. 22)

Q. All right. Did you question, when it came to executive session, how that could be a personnel matter if it doesn't mention any people?

A. Not at all. It has to do with laying off quite a large number of people. I call that a personnel matter.

Q. Would you consider that any item that had to do with hiring or laying off large numbers of people and, yet, did not specify any names, would be a personnel matter --

A. Absolutely. (R.T. 2018, l. 11 - 19)

Defendants also relied on Exhibit C (E-17), a Memorandum Decision by Judge Warner. The only testimony relating to the factual basis for that decision was Fisher's. She was also the only one who had any knowledge

of what was said during the hearing. She remembered that Stern testified, and that he said that the report was his but he made it look like ongoing business for strategic purposes. Fisher supoenaed the transcript for that hearing. The clerk delivered several cartloads of Carlin case files to the courtroom, but the transcript of the hearing before Judge Warner wasn't included.

<u>The evidence does not support an affirmative answer to issue no 29.</u>

The statement listed is,

> "Julie Fisher's collaboration last spring with the striking teachers -- who defied the law and a judge's order -- was, in my opinion, a direct violation of her oath of office to uphold the law."

This was taken from Larsen's 'privacy' news release. When asked about the violation of oath to uphold the law, Yvonne Larsen testified,

Q. Okay. Now, what was it that

you said -- was it a violation of my oath of office to uphold the law?

A. By violating the privacy act, by writing down students' names on papers and distributing them at a public body. (pg 1019, l. 18 - 22)

Defendants' attorney Irwin asked the judge to include an instruction to the jury that as a matter of law what was stated by Larsen about Fisher breaking the privacy law was true. The Court complied.

Fisher testified that what she made available to the administrators were the same work sheets that Patrick went through during the 'exercise' (page 9 - 16 of this document). During the T.V. report of Larsen's 'privacy' news conference that was shown to the jury, Larsen showed the same material to the camera, except that it had some added scriblings on it.

Fisher stated that she had explained, in detail, the material to the editor of the Union. She doesn't dispute that she broke the privacy law in that context. However, when she asked Goodman to go over the material

(pg. 453 - 458) he couldn't identify any information about any student listed, and he wasn't positive that the names were those of students. Without detailed explanation the material was meaningless.

> The Court: What is it you want to bring up?
>
> Ms. Fisher: Well, you honor, I believe that Mr. -- Mr. Irwin has been saying that I can't use -- use the pupil privacy matter in my evidence because the Court of Appeals said it was true that I divulged private information about the students. Now, we just had the superintendent of schools, who couldn't make anything out of the material that I made available to the administrators, and I don' think that -- if the superintendent of schools can't make it, how can you say that I divulged private information?
>
> The Court: The Court of Appeals' decision binds me and it binds you and it binds Mr. Irwin. They say in there that the privacy issue is not an issue because of the reasons they gave. Now, maybe they made a mistake, maybe they didn't; but that binds us on this trial.
>
> Ms. Fisher: But that doesn't mean that I can't bring it out, that I can't provide this and discuss it as part of my evidence in showing the

state of mind of Mrs. Larsen.

The Court: That's right. It's out of the case, and that's why you're not supposed to -- you're not supposed to go into it.

Ms. Fisher: But can't I bring that out, the fact that she -- that she used that document as a basis for the -- for saying that I broke the privacy law as evidence of her state of mind, your honor?

The Court: I don't think so. Do you want to be heard?

Mr. Irwin: Only if she's going to go into this in spite of the Court's ruling Friday and what you've said today, your honor. We're entitled to an instruction to the jury that she did break the law. It's a matter of law. (pg. 464, l. 20 - pg. 465, l. 21)

The resulting jury instruction:

"The Court of appeal has determined that the plaintiff violated the Pupil Privacy Law, as stated in the Larsen Campaign statement of November 4, 1977. Therefore, the statements in the statement about the plaintiff's violation of the law are true. You may not consider these statements to be a defamation of the plaintiff by defendants."

EVIDENCE THAT THE COPLEY DEFENDANTS PUBLISHED THE ARTICLES WITH ACTUAL MALICE

1. Fisher testified that from June through November of 1977, Union articles carrying Michael Scott-Blair's by line contained over a dozen statements which were falsely attributed to Fisher, each of which was enclosed in quotation marks indicating that it was a direct quote of Fisher. (FIRSTA[1]-81-90)

2. Petitioner's testimony states that prior to the publication of the libels cited in the original complaint, for each of the statements, she had at least one conversation with Scott-Blair or there was at least one meeting which they both attended during which the truth regarding the subject matter was clearly stated.

3. Scott-Blair, in his deposition, stated that he had routinely destroyed his notes of the 1977 campaign and that he did not remember

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[1]FIRSTA refers to the Appendix to Appellant's 1982 Court of Appeal Opening Brief.

any of the interviews or meetings which were reported. He testified that he had no independent recollection that would contradict petitioner's testimony pertaining to their conversations.

He said that Fisher had told him that she opposed teachers' strikes, that he never reached the conclusion that Fisher was in favor of the teachers going out on strike, and that his August 31 article (pg. B-7) was not intended to imply that Fisher supported the strike.

Blair testified tha the 'marching' statement was based on his observation that Fisher's path as she walked from her car into the Education Building was not a straight line, that she appeared to walk along with some of the teachers -- along the legs of a triangle rather than what would have been the 'hypotenuse of that triangle, the straight line path from her car to the door. He said that he didn't check the files for pictures taken

of Fisher's 'walk' before writing the September 21 marching story and that such a check would have taken less than 15 minutes.

When asked if he remembered Fisher offering to play for him the portion of the tape of the July 19 Board of Education meeting about the mandatory nature of the integration program, her said "I recall a conversation with Mrs. Fisher pertaining to a tape, but I don't know if that was the circumstance." (FIRSTA-91-125).

4. The testimony of Beatrice Andalaft and Fisher states that between June 20, 1977 and October 21, 1977, Union Editors were repeatedly notified of the falsity of statements the Union was printing about Fisher. Andalaft and Fisher made two complaints directly to the publisher, five directly to Editor Warren, four to the readers representative, Alfred JaCoby, one to Editor Zumwalt, and one to Editor Zimmerman. In addition, Fisher was interviewed by the Editorial Board of the

Union late in August.

On 11 of these occasions Union officials were notified of specific false statements published in the Union about Fisher. Petitioner's first request for retraction of a particular defamatory falsehood was made directly to Editor Warren on June 20, 1977.- Fisher did not comply with the requirement that requests for retraction be in writing as dictated by CC48a, until after the election.

5. Alfred JaCoby testified that he investigated the truth of the statement printed in the Union on September 21, 1977, "Fisher marched with striking teachers." He viewed unpublished pictures of Fisher walking from her car into the Education Building on June 9, 1977, telephoned Fisher and interivewed three reporters who were present at the time of the incident. JaCoby deterimined from his investigation that the statement was false and so reported in his article titled Uplavchi Syndrome (pg. B-80). The article, published

on October 17, 1977, three weeks before the November 8 election (FIRSTA-126-129)

6. According to their deposition testimony, Union Publisher Helen Copley, Union Editor Gerald Warren and Union Associate Editor Peter Kaye read the Uplavici column when it was published (FIRSTA-166-167, FIRSTA-189, FIRSTA-210-211)

7. The Union published six of the articles for which petitioner filed suit after the publication of the Uplavici column. (B-34, B-41, B-46, B-52, B-62, B-73)

8. Marion Dreshler, a Copley International Executive, testified that Copley International, which in 1977 was a subsidiary of Copley Press, conducted a poll 8 to 10 days before the November 8 election. The computer printout, listing the results, which is appended to her deposition, shows that Fisher was leading Larsen by a substantial margin with every category of voter.

Peter Kaye stated in his deposition, that

partial results of that poll were published in the Sunday Nov. 6 Union.

9. Editor Gerald Warren in his deposition stated that, in the Union, the location of greatest prominance for a local news story is the upper right hand corner of page B-1, the first page of the local section of the paper. (See the discussion of headlines in the INTRODUCTION to the Jurisdictional Statement)

10. Scott-Blair stated in his deposition that he did not make the decisions as to where in the Union his stories would be located or as to the wording or size of the headlines.

In their depositions Editors Warren and Kaye described the usual process for determining the 'play' of a story as one that involves many persons at various levels.

Warren stated that whether or not a story is defamatory is 'considered at every level' (FIRSTA -135-146).

11. Karin Winner, Scott-Blair's immediate

supervisor, testified that the Fisher-Larsen campaign was her responsibility and that she had no recollection of any investigation as to the truth of statements published by the Union about Fisher.

She didn't remember if any employee of the San Diego Union ever checked the factual accuracy of the articles. (FIRSTA-147-159)

Peter Kaye, Associate Editor of the Union, stated in his deposition, that he had no knowledge of any facts supporting any of the defamatory statements published by the Union about Fisher, and he knew of no attempt by any Union employee to determine prior to publication if any of the statements were true.

Editor Warren stated in his depostion that he had no knowledge of any facts supporting any of the defamatory statements published in the Union except for the statement contained in the Septemer 21, 1977 article that Fisher had attempted to discredit the administration's integration plan. He also stated that he had

no knowledge of any attempt by any Union employee to determine if any of the statements made about or by Fisher were true. (FIRSTA-1-60-185).

12. Scott-Blair testified that he was not told by any editor during the Fisher-Larsen campaign, that his stories were biased or unfair to Fisher.

Editor Warren and Associate Editor Kaye both stated during their depositions that they did not recall discussing with Scott--Blair any of the articles pertaining to the Fisher-Larsen campaign.

Kaye said he knew that an investigation of the coverage was conducted at some time but he couldn't remember if it was before or after the election (FIRSTA-186-192).

Publisher Copley testified that it is Union policy to send retraction requests coming from lawyers to the Union's lawyer, and that she knew of no record kept of retraction requests that do not come from lawyers.

She said that the decision as to whether or not a retraction is printed is left to the editor and the Union attorneys.

When questioned about Fisher's formal requests for retraction, Publisher Copley testified that she didn't remember any of them.

Associate Editor Peter Kaye testified that the Union has a different procedure for processing requests for retractions coming from lawyers than from others, and that what happens to requests from non-lawyers varys.

Scott-Blair testified that he was not informed by anyone of the San Diego Union that Fisher had asked for retraction of some of the articles he had authored.

Editor Warren stated in his deposition that he saw Fisher's requests for retraction, however, he didn't remember what was done with them. (FIRSTA-216-228)

EDITOR'S NOTE

PAGE E-1 thru END WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

SAN DIEGO UNIFIED SCHOOL DISTRICT
ACCOUNTING DEPARTMENT - PUPIL ACCOUNTING SECTION
REPORT OF NONAUTHORIZED ABSENCES 1974-75

[illegible]	Enrollment 10/11/74	1st School Month 20 days	2nd School Month 20 days	3rd School Month 17 days	4th School Month 10 days	5th School Month 20 days	6th School Month 17 days	7th School Month 15 days	8th School Month 20 days	9th School Month 20 days	10th S Mon 19 d
Alternative	68	27	24	45	26	61	49	50	125	83	
Clairemont	2,403	445	574	554	725	899	565	441	602	1,031	
Crawford	1,942	541	595	612	641	745	699	474	692	761	
Emory	2,947	1,953	1,641	1,614	948	2,255	1,400	945	1,159	1,194	
Emory Eve	256	79	268	311	213	262	140	212	274	233	
Hoover	1,542	595	963	851	460	833	499	515	624	731	
Kearny	3,020	1,128	1,435	1,419	1,121	1,852	1,354	1,207	1,669	1,869	
La Jolla	1,450	223	292	389	353	586	437	341	478	377	
Lincoln	974	410	390	360	96	425	421 24.1	349 23.3	397 19.9	420 21	
Madison	3,566	337	801	907	638	1,207	802	561	1,079	676	
Madison Eve	292	134	217	163	75	65	142	81	139	159	
Mission Bay	1,392	436	756	728	553	1,185	772	529	719	785	
Mesa	1,765	534	980	606	504	1,058	755	476	994	1,180	
Mt. Loma	1,843	555	760	897	636	878	622	738	790	901	
San Diego	1,639	578	664	702	358	496	1505 554	36.8 1505 511	34.1 1145 454	39.7 379	19
Wright Bros.	229	237	211	205	118	204	151	154	219	267	
Gr. 10-12	26,328	8,212	10,575	10,363	7,667	13,011	9,362	7,584	10,434	11,066	
Gr. 9-12	36,214	11,225	15,592	14,567	10,384	18,238	14,382	11,485	15,602		
Gr. 7-12	56,159	16,037									

E-1

San Diego

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(82)

Lincoln less than 4 (80)

Norse 𝍸 || (7)
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Nebion 𝍸 𝍸 𝍸 𝍸 𝍸 𝍸 𝍸 𝍸 𝍸 (45)
Kearney 𝍸 𝍸 𝍸 𝍸 ||| (23)
Hoover |||| (4)

San Diego Jan thru 4 2-3-75
10th Thru 4-11-

nso, Manuel	5	42	0
derson, Billy	5	34	0
derson, Mark	2, 5	18, 30	0
Arrasmith, Karen	6	25	0
rkshire	4	36	0
rello, Manuel	4	34	0
ino, Anthony	5, 6	20	0
telo, Julio	5, 7	2	0
trenas, Jose	4	36	0
rna, Carlos	3, 5, 6	38, 24, 27	0
gedo, Juan	3, 4, 6	42, 10	0
z, Tony	5	42	0
n, Margaret	2, 4, 6	34, 30, 13	.50
quez, Lorraine	3, 6, 6	27, 40, 20	0
ller, Prenta	4	42	0
briele, Debbie	5	—	0
rcia, Louie	7	42	0
ney, Andrew	2, 4, 7	14, 43, 42	0
rigsby, Conny	2	2	0
dson, Bobbie	6	37	0
nes Debra	2, 7	42	0
night, James	3, 5	42, 24	0
tt, Wallace	5	40	0
rsenal, Victor	3	42	0
Zano, Estelle	5	42	0
na, Roger	5	42	0

San Diego Less than 4

...ster, Dwight	2, 7	31, 25	100
...ares, George	5, 7	40, 42	0
...arlen, Doyle	2, 5, 7	22, 22, 38	0
...arquez, Pattie	3	26	0
...artin, Perry	4	35	0
Mc Coy, Walter	5	36	0
Mc Cue, Marshall	2, 4, 7	- - 20	0
Mellado, George	5	35	0
...ash, Patricia	2, 3, 6	32, 20, 30	0
Ortega, Maria	5	42	0
Pollard, Elvis	6	—	0
Ramirez, Lupe	2, 5	42, 40	0
Salazar, Maria	4	30	0
Simpson, Kimberly	5	39	0
Zamayo, Arturo	2, 4	28, 24	0
...pez, Maria	3, 5	42, 42	0
Tomas, Barbara	6, 7	3, 14	0
Turner, Wanda	2, 4, 6	32, 32, 28	0
Vest, Charles	3, 6	42 —	0

11th

Bones, Belia	2, 4	24, 6	1.50
Brown, Richard	2, 3, 7	14, 14, 12	0
Caldwell, Jacqueline	2, 4, 5	40, 30, 34	0
Carrillo, Baltazar	3	42	0
Cabrera, Sara	3	42	0

San Diego less than 4

11 Ct

...rdner, Charlene	2, 4, 7	40 - 42	0
...bbons, Allen	5	24	1.00
...nzalez, Magda	3, 6, 7	— 30, 40	0
Hamilton, Angela	3, 5, 6	42, 34, 24	.33
Johnson, Keith	4, 7	40, 36	0
Johnson, Ricky	2	40	0
Jones, Shelia	3, 5, 6	27, 38, 38	0
Mc Donald, Dwight	2, 3, 6	12, 32, 30	.3
Mc Gee, Deborah	2, 4	30, 20	.25
Mendoza, Ralph	2	—	0
Murphy, Cecil	7	—	0
Oakes, Roy	2, 3, 4	23, 36, 40	0
~~Stephens, Fatima~~			
Pacheco, Ernie	5	42	0
Perez, Scott	2, 4, 5	12, 5, 4	.5
Rodriguez, Rafael	3	42	0
Rodriguez, Danny	5	28	0
Salcedo, Delia	6	19	0
Southall, Dwight	4, 5	2, 18	1.5
Torres, Deborah	1, 3	—	0
Burns, James	5	42	0
Cochran, Sammy	2, 4, 5	42, 42, 34	
Cook, Jimmie	4, 5, 7	42, 40 -	0
Cruz, Clay	6	—	0
Evans, Kelvin	5	42	0

San Diego Less Than 4

Arvey, Michael	1	25	1.00
Hernandez, Lora	4, 5, 6	39, 38	0
Jacome, Melissa	2, 3	40, 40	0
Jenkins, Elaine	6	24	0
Rodrigues, Miguel	5	42	0
Sorenson, Robert	3	42	0
Torbol, Frank	6	38	0

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$$35.5$$

SPECIAL CONDITIONS [illegible]

SCHOOL — TERM 2, 1974-75 MARK REPORT PERIOD 02-03-75 [illegible]

STUDENT ID	GRADE	SEX	COURSE TITLE	TEACHER	PERIOD	DAYS SET	SCHOL.	CITIZ.	ABS.	CHAIN	MPA
227-128	12	G	COOP OFF ED 1-2	STAFF	02	MTWRF	A	E	4	94	3.75
			ENG IND RDG 1 TM	STAFF	03	MTWRF	U	U	0		
			US HIST 2	CARBONE F	04	MTWRF	A	E	2		
			CO ED PHYS ED	STAFF PE	05	MTWRF	A	E	2		
			GEN WK EXP	KAKAMURA S	06	MTWRF	NM	NM			
1556-247	12	B	PLER INV 3	MISBY, K	02	MTWRF	F	U	18	25	1.83
			BAS BIOL 2	FLOYD G	03	MTWRF	F	N	24		
			ENG ETHN LIT 1	STEARNS C	04	MTWRF	C	N	10		
			FOCUS 1 NURN 2	ROBERTS, M	05	MTWRF	U	G	6		
			TYPING 1	ANDERSON, W	06	MTWRF	C	U	26		
			INTSCH ATHL	STAFF	07	MTWRF	A	S	7		
1257-108	12	B	ADV BAND	BROWN, O	02	MTWRF	A	S	2	76	3.20
			INST ENS SU	BROWN, O	03	MTWRF	A	G	0		
			CO ED PHYS ED	STAFF PE	04	MTWRF	C	G	10		
			MTL SKLS OCC 1	SCHAEFER, R	05	MTWRF	C	S	10		
			LANG ENG SH	MASTER 1	06	MTWRF	A	E	0		
1557-430	12	B	DRAMA 2	ELLIOTT D	02	MTWTF	A	E	0	96	3.83
			SPAN 4	METZEL J	03	MTWRF	A	G	4		
			CO ED PHYS ED	STAFF PE	04	MTWRF	A	E	0		
			CHOIR HELP	BROWN, O	05	MTWRF	A	E	2		
			BIOL 2	VELTAL E	06	MTWRF	A	E	4		
			ECOLOGY 1	GADDIS K	07	MTWRF	A	E	2		
1657-550	12	B	AM LIT 1	MADLU M	02	MTWRF	A	E	0	82	3.33
			CO ED PHYS ED	STAFF PE	03	MTWRF	A	E	0		
			US HIST 2	BRYANT L	04	MTWRF	A	E	4		
			AM GOVT 2	GADDIS K	05	MTWRF	U	E	0		
			WOODWORKG 1	BRIPORT, D	06	MTWRF	A	E	0		
			PHYSICL 2	KASHIWA T	07	MTWRF	C	E	2		
1558-640	12	G	US HIST 2	CARBONE F	02	MTWRF	A	E	0	88	3.50
			SPAN 4	METZEL J	03	MTWRF	A	E	2		
			GERM 2	JOHNSTONE, J	04	MTWRF	B	E	10		
			AM GOVT 2	MOLLEN F	05	MTWRF	B	E			
			ENG COMP IMS 1	IRVING C	06	MTWRF	A	E	2		
			CO ED PHYS ED	STAFF PE	07	MTWRF	D	E	5		
			GEN WK EXP	KAKAMURA S	00	MTWRF	NM	NM			
1257-391	12	B	CO ED PHYS ED	STAFF PE	03	MTWRF	F	U	42	04	0.00
1157-141	12	B	PED EXC HOME	WILLIAMS D	01	MTWRF	NM	NM	6	99	4.00
			DRAMA 3	HALL, H	02	MTWRF	A	E			
			AM GOVT 1	LANG F	03	MTWRF	I	E	36		
			SCIENCE OES HK	HALL H	04	MTWRF	A	E	0		
			DRAMA 4	HALL, H	06	MTWRF	A	E	2		
			OFF SERV CR	GIOVANAZZI D	06	MTWRF	A	E	4		

In the Matter of Arbitration	)	
	)	
between	)	
	)	
SAN DIEGO UNIFIED SCHOOL DISTRICT	)	
	)	
and	)	
	)	
SAN DIEGO TEACHERS ASSOCIATION	)	OPINION and AWARD
	)	
before	)	June 17, 1974
	)	
EDGAR A. JONES, JR. Impartial Arbitrator	)	
	)	

I.

Findings of Fact

This arbitration was commenced to respond to the grievance of the Head Teacher -- Mrs. Thelma Johnson -- of the J. F. Kennedy Children's Center that she was demoted on November 30, 1973 to the position of Teacher and transferred December 3 to another children's center in violation of the Collective Agreement operative between the School District and the Teachers Association. The Kennedy Center serves a community largely composed of black families with an enrollment of about 100 neighborhood youngsters, ages 2-14, half school age, half pre-school, and about nine staff members. Mrs. Johnson is a black teacher who has spent twenty years as a District teacher. Her successor as Head Teacher is also a black woman.

A. The Events Giving Rise to the Grievance

The School District some years ago instituted a program to establish at or adjacent to regular elementary and junior high schools a series of child-care centers to receive, care for, and educate throughout the day youngsters from 2 to 14 years of age. The children are brought to them by qualifying low-income parents -- the majority of whom (Tr. 148) are present, past or potential welfare recipients -- who are employed, or are in some kind of training program, or are themselves attending school.

By 1973, the District was operating 25 of the Children's Centers. Sixteen are located in separate buildings designed for the purpose while nine "minicenters" are located in regular

(d) The Stegeman memorandum continues: "There are also reports of favoritism toward certain other staff members and allowing many absences from the site." Again, at the hearing not a single report was produced, nor even, one witness proffered, in support of that damaging and quite evidently misleading assertion.

(e) The memorandum alleges that Mrs. Johnson, sent by the District to Sacramento to talk to legislators, sought to "get rid of the administration in the San Diego programs." The asserted source for this very serious accusation was thus described: "one of the parents who accompanied her advised us." Now whoever that person was, if such a person existed, no one was presented by the District at the hearing as a witness, either voluntarily or under subpoena, to testify and be cross-examined about what Mrs. Johnson allegedly did or said to warrant such a damaging accusation of disloyalty. That kind of faceless defamation is wholly inadmissible in arbitral or judicial proceedings. It is so profoundly incompatible with the basic American precepts of procedural fairness and justice that it is universally denied even the slightest scintilla of evidentiary weight. The same infirmity of proof applies to the repeated references to clerks and staff members when the District did not produce to prove under oath its allegations of what they said, thought, or did. In sum, therefore, the dictate of the Agreement mutually negotiated by the parties is that if information is received (or solicited) in written form that, one, is derogatory to a teacher and two, constitutes an input relevant to adjudging performance, its receipt becomes the occasion for its disclosure. This may be through a conference with or a memorandum to the teacher. Its validity may thus be tested. It is part of the employee's "file," for the contractual purpose of the right to disclosure and commentary, regardless of in which manila folder or in whose memory it may be stored. If the derogatory data is not committed to writing, filed, and disclosed, but is regarded as an input relative to adjudging performance, it is likely to be held at a later date (as here) to be inadmissible or its evidentiary value to be seriously impaired in a subsequent proceeding when proffered as proof.

2. Failure of the District to Adhere to the Board's Own Procedures for Transfer

When Mrs. Johnson was demoted she might well have wished to remain as a teacher at Kennedy. Demotions by no means automatically entail transfer from a site. There would obviously be factors pro and con both for her and the District to consider and discuss. But no

conference occurred; she was simply notified on December 3 of her transfer to Euclid. She was summarily transferred. Inexplicably (and unexplained), this was even handled in a manner disturbing to the children in attendance at the Center at the time. As one parent reported it, "The fact is the day Mrs. Johnson was removed in the Center, when we came from work that afternoon the kids were just hysterical. They were all crying, 'Why did they take Miss Johnson away? What happened?' They did this in front of the children -- and I think if they were so concerned about our kids they wouldn't have done it in the manner that they did." (Mrs. Vilma Scott, Tr. 238)

Yet, in contrast, the District's own regulation (No. 433 quoted above at I-C-3) is quite detailed and precise about how transfers (regardless of the existence of any preceding employer action, whether promotion or demotion) shall be accomplished.

It is patent sophistry to suggest that the District's action transferring Mrs. Johnson from Kennedy to Euclid was not a "transfer." Dr. Goodman was explicit in his letter of December 10 in recognizing that the action was indeed a transfer. (Jt. Ex. #3, quoted above in I-B) Failure to adhere to the transfer procedures is not simply some inconvenient technicality to be casually overlooked. (There is a considerable irony in the effort of administrator to avoid adherence to "awkward" strictures of District and contractual procedures themselves while being so critical of a Head Teacher for failure to adhere to yet another set of District procedures no less "awkward" -- albeit necessary -- by everyone's acceptance.) The rights conferred on teachers by the Board in instances of transfer are substantial ones and should not be allowed to be flouted. The failure to accord Mrs. Johnson these rights was contractually wrongful and it constitutes a material element in the conclusion of the Arbitrator that the District did not act reasonably and justly in her demotion and transfer.

B. The Merits of the Demotion Action Itself

Perhaps the most surprising aspect of this case as one reviews the 404 pages of transcribed sworn testimony and the numerous exhibits is that in three days of hearing no evidence whatsoever was proffered to show that the educational quality of what went on in Mrs. Johnson's concededly experimental program in the Center, in its classrooms, and on its playground was other than worthwhile, professionally proper, and even commendatory.

III.

Advisory Award

A. This matter was heard on March 14, 15 and 19, 1974, exhibits being received, testimony being taken under oath and transcribed, and arguments being heard. The transcript was issued by April 10, 1974, and briefs were received by May 15, 1974. Appearances: for the School District: Wayne A. Spicer, Manager, Employee Relations; Harry A. Marriner, Employee Relations Department; for the Teachers' Association: Louis A. Boitano, Executive Director; Alora G. Azevedo, Field Organizer.

B. The advisory decision is as follows:

1. Mrs. Thelma Johnson shall be reinstated as Head Teacher effective July 1, 1974; and that

2. Mrs. Johnson shall periodically be counselled at 30-day intervals with written minutes thereof, dated and signed as accurate by her and by her counsellor; and that

3. Mrs. Johnson shall be evaluated as Kennedy Children's Center Head Teacher on or about November 1, 1974, in accordance with the accepted practices utilized by the District in its evaluations of Head Teachers in the Children's Centers Program.

C. Jurisdiction is retained by the undersigned, and this hearing shall remain open, to resolve any disputes that may arise in administering this award. Such jurisdiction shall automatically cease and this hearing shall be closed at midnight, August 31, 1974, unless one or the other of the Parties by written motion for specific relevant and material cause stated in supportive detail, shall successfully move that the hearing resume in order to dispose of the specified material in dispute.

Edgar A. Jones, Jr.

DRAFT VIII
10/12/76

SAN DIEGO CITY SCHOOLS
Secondary Schools Division

OPTIONAL ATTENDANCE AREAS

Introduction and Background

Attendance boundaries are established in order to obtain the maximum educational utilization of school district facilities, consistent with the safety and convenience of students. From time to time specific conditions exist that pose difficulties for students who attempt to attend their assigned school. Sometimes options were established in order to alleviate these conditions. It is our belief that all optional zones were established for bona fide purposes, some of which no longer exist. One of the purposes of this report is to provide information resulting from an examination of the optional attendance areas to determine any need for their continuation.

District Procedure #0412 stipulates the policy for the establishment and change of attendance area boundaries. The procedure also provides for the designation of some sections of the school district as optional attendance areas. General criteria or considerations listed in the procedure in the establishment of boundaries include the following:

1. Convenience and directness of travel, including the availability of public transportation in the case of secondary schools.

2. Topography, including hills, canyons, major streets, freeways, and drainage channels.

3. Hazards affecting the health and safety of students and staff.

4. Racial and ethnic balance.

5. School size -- the balancing of school enrollments to achieve optimal size (from the standpoint of balanced educational program, cost and manageability); and the reduction of overcrowding.

6. Effect of special programs, cluster grouping, etc., which cross established boundaries.

7. Location of available school facilities.

8. Number of students to be housed, usually for at least a three-year period.

For a number of years the district has made a concerted effort to reduce the number of optional areas rather than to increase them. While optional areas do provide parents and students a choice in selecting a school of attendance and sometimes make transportation arrangements more convenient, several disadvantages related to such areas have been identified. These areas tend to:

1. Create confusion regarding the regulations governing schools of attendance for different areas in the city.

2. Give people the impression that attendance zone boundaries have little significance. This encourages people to "borrow" addresses in order to send their children to any school they wish.

3. Encourage people to ask for exceptions in other areas. Increase the number of requests for special attendance.

4. Place one school against another, particularly high schools, and they begin to compete for student enrollment. Encourage coaches and other teachers in specialized instructional areas to "recruit" talented studen

5. Create controversy between parents and the school district rather than solve problems. People want to exercise the option a second time when it turns out that they don't like their first choice.

6. Encourage the vast majority of students to attend one school and very few the other. This sometimes creates the feeling that one school is better than another.

Study requested by the Board of Education in consideration of legislation relating to ethnic balance in schools.

The Board of Education on May 6, 1975 requested that a plan be developed to elimina all optional attendance areas. The objectives of the study were as follows:

1. Identify each optional attendance area.

2. Describe the number of students residing in optional areas.

3. Ascertain the number of students exercising the option to attend a school other than the school of residence.

4. Ascertain ethnic balance under existing option.

5. Predict ethnic distribution if option discontinued.

6. Determine whether or not the purposes for which optional zones are established can be better accommodated by special attendance permits which concern individual students for a limited period of time.

7. Recommend disposition of optional attendance areas.

The Study

An extensive study considered the significant implications of discontinuing all optional attendance zones, including the following.

1. Effect on ethnic balance in both the receiving and sending school.

2. Impact on facilities.

3. Enrollment balance between schools.

The study included an individual survey of the ethnicity and attendance choice of each student living in each of the optional zones.

Details of the findings, conclusions and recommendation for each optional attendance area is shown in the Appendices as follows:

Appendix A	Gompers - Mann
Appendix B	Gompers - Memorial
Appendix C	Gompers - O'Farrell
Appendix D	Bell - O'Farrell
Appendix E	Lincoln - Morse
Appendix F	Roosevelt - Wilson
Appendix G	Pt. Loma - San Diego
Appendix H	Marston - Pacific Beach
Appendix I	Muirlands - Pacific Beach
Appendix J	Einstein - Marston
Appendix K	La Jolla - Mission Bay
Appendix L	Proposed Boundary and Attendance District Changes, May 6, 1975

General summary and recommendations

Although the elimination of all optional attendance zones in the San Diego Unified School District would have no impact upon the racial/ethnic balance in some schools, the impact in others would be significant. The general effect of discontinuing all optional attendance zone areas would be to improve the ethnic balance in the district. Additionally, the elimination of optional attendance zones would, in a number of instances, improve enrollment balance between schools.

It is recommended that:

1. Effective September 1, 1977, all optional attendance zones in the district be discontinued and that these optional areas be assigned to regular attendance zones as indicated below.

2. The action affect only incoming seventh and tenth graders and that eleventh and twelfth graders be permitted the choice of enrolling in a new school of attendance or continuing at their present school location.

3. That siblings be allowed to attend the same optional school with older brothers and sisters until such time that those enrolled in these schools during the 1976-77 school year have been promoted or have graduated.

Pages E-14 through E-16

SAN DIEGO CITY SCHOOLS
Secondary Schools Division

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8. Number of students to be housed, usually for at least a three-year period.

For a number of years the district has made a concerted effort to reduce the number of optional areas rather than to increase them. While optional areas do provide parents and students a choice in selecting a school of attendance and sometimes make transportation arrangements more convenient, several disadvantages related to such areas have been identified. These areas tend to:

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Optional Area	Assign to
Gompers - Mann	Gompers
Gompers - Memorial	Gompers
Gompers - O'Farrell	Gompers
Bell - O'Farrell	O'Farrell
Lincoln - Morse	Lincoln for students attending Gompers, Morse for students attending O'Farrell and Bell
Roosevelt - Wilson	Roosevelt
Pt. Loma - San Diego	San Diego
Marston - Pacific Beach	Marston
Muirlands - Pacific Beach	Pacific Beach
La Jolla - Mission Bay	Mission Bay

Optional Area	Assign to
Compers - Mann	Compers
Compers - Memorial	Compers
Compers - O'Farrell	Compers
Bell - O'Farrell	O'Farrell
Lincoln - Morse	Lincoln for students attending Compers Morse for students attending O'Farrell and Bell
Roosevelt - Wilson	Roosevelt
Pt. Loma - San Diego	San Diego
Marston - Pacific Beach	Marston
Muirlands - Pacific Beach	Pacific Beach
La Jolla - Mission Bay	Mission Bay

MEMO TO FILE
FROM: DRL
RE: Carlin v. S.D.U.S.D.
DATE: July 1, 1975

This morning I had a conference with Stern and Patrick concerning Optional Zones.

I explained to Patrick and Stern that as I understood the law, no matter who did the study, any documents or tangible evidence that were turned up would be available for discovery by the plaintiffs. However, if a study was done on behalf of the attorneys, then perhaps we could keep the study itself out under the work product rules.

Patrick came up with the idea that rather than going into a long, lengthy historical sub-study, he would objectively view the optional zones as they now exist and, applying the following criteria, determine if they should continue to exist.

1. Convenience and directness of travel.
2. Topography
3. Hazards effecting Health or Safety of Students and Staff.
4. Racial and Ethnic balance.
5. School size
6. Effective special programs.
7. Location of school facilities and
8. Number of pupils to be housed.

These are the criteria set forth in administrative regulation 0412.

He indicated he was going to attempt a study by December, and have whatever Board Hearings would be necessary in January. While it might be possible, if the trial was actually to be held in November, to have the Board act prior to that time.

He stated that one of the big areas of controversy would relate to the San Diego Point Loma Optional Zone in Mission Hills. One of the problems is the curriculum at San Diego at present is presently inferior to that set forth at Point Loma. Although Patrick said he would make every effort to resolve that problem.

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

KARI CARLIN, et al., Plaintiffs, v. BOARD OF EDUCATION, et al., Defendants.	CASE NO. 303,800 MEMORANDUM DECISION

On December 16, 1976, Judge Louis M. Welsh stated in a chambers' conference as follows:

> ". . . This Court has determined that all matters contained within the report, which are communications between counsel and his client, the Board, in preparation for the trial which may fairly be considered to be trial preparation, which are privileged, that those matters should not be disclosed. But as things stand now, the only people that are making the judgment as to what is or what isn't confidential, are the parties themselves. Namely the defense counsel.
>
> "The only thing the other judge will be required to determine, he will look at the original report in camera to determine whether or not there are matters within that report

that are not confidential. In other words, he will make a factual determination. Based upon that, the plaintiffs will either get it, or they won't get it."

Counsel for defendants have presented to the Court original a excised versions of the document dated October 19, 1976.

The questions presented are:

(1) Do the excised portions come under the attorney-client privilege?

(2) Does the furnishing of certain material from the document in question to the plaintiff by one of the Board members waive the privilege for other Board members?

The excised portions are conclusions and recommendations prepared by or with the assistance of counsel. They were presented to the Board at executive session. As such, the excised portions come within the attorney-client privilege.

As to the second question, the Court holds that a waiver of the attorney-client privilege by one member of the Board of Education does not affect the right of the other members to claim that privilege with respect to the optional zone report discussed with counsel in executive session.

Dated: _____

_____
JUDGE OF THE SUPERIOR COURT

/gh

Pages E-17 and E-18 without the case heading.

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Supreme Court, U.S.
FILED
DEC 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-799

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

JULIE FISHER,
Appellant,

VS.

THE COPLEY PRESS INC., YVONNE LARSEN,
W. DANIEL LARSEN, JOSEPH HARMON,
EDWIN GRAY and MICHAEL SCOTT-BLAIR,
Appellees.

On Appeal from the Court of Appeal of the State of California, Fourth Appellate District

MOTION TO DISMISS OR AFFIRM

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15 pp

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No. 86-799

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On Appeal from the Court of Appeal of the State of California, Fourth Appellate District

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MOTION TO DISMISS OR AFFIRM

The Appellees THE COPLEY PRESS, INC. and MICHAEL SCOTT-BLAIR respectfully move to dismiss the appeal on the grounds that there is an adequate non-federal basis for the judgment and that the appeal does not present a substantial federal question, and alternatively move to affirm the judgment on the ground that it is correct.

MOTION TO DISMISS

I.

THIS COURT SHOULD DISMISS THE CASE BECAUSE THE JUDGMENT RESTS ON AN ADEQUATE NON-FEDERAL BASIS.

A. The Proceedings Below

Appellant JULIE FISHER, an unsuccessful candidate for reelection to the San Diego Board of Education, filed this action for libel and slander in 1978 against her opponent, YVONNE LARSEN, her opponent's husband, W. DANIEL LARSEN, her opponent's campaign workers, JOSEPH HARMON and EDWIN GRAY ("the LARSEN campaigners"), THE COPLEY PRESS, INC. and its reporter MICHAEL SCOTT-BLAIR arising out of campaign statements and coverage of the political campaign.

The hotly contested election closely followed an illegal, widely publicized teachers' strike by the San Diego Teachers' Association after which FISHER and other school board members granted amnesty to the strikers although the strike activities violated a court injunction. During the primary and general election campaigns, FISHER and LARSEN engaged in a series of claims and counterclaims concerning their positions on the issues which were reported in the media.

The case involving the LARSEN campaigners proceeded before a jury in July, 1984.[1] After a three-week

[1]In the proceedings below, the appellees had initially obtained summary judgments in their favor. The appellate court, acting before this Court's pronouncement in *Jack Anderson v. Liberty Lobby, Inc.*, 477 U.S. ____, 91 L.Ed.2d 202 (1986) and before the California Supreme Court decision in *Reader's Digest Assn. v. Superior Court*, 37

trial in which the jury had the opportunity to see the witnesses and evaluate the credibility of the parties, the jury returned a verdict in favor of the LARSEN campaigners, finding that the statement "Do taxpayers like it when JULIE FISHER appears at union rallies and supports their demands" was true, that the statement that "JULIE FISHER was associated with the teachers' strike every step of the way" was true, that the statements about FISHER's "blackmail" of the school superintendent were true, and that the statement concerning "JULIE FISHER's collaboration last spring with the striking teachers" was true.

At the trial of the defense that FISHER had failed to comply with the retraction statute, California Civil Code Section 48a, FISHER admitted that she had failed to demand written retraction of the statement in issue, and judgment was entered accordingly for these Appellees.

B. The Truth of the Allegedly Defamatory Statements Is an Adequate Non-Federal Ground for Dismissal

At trial, the school superintendent testified that FISHER participated in the strike and worked on the side of the teachers. An attorney for the school district testified that FISHER supported the teachers in the strike. The school board president stated that FISHER was "100% on the side of the striking teachers." Evidence showed that FISHER assisted union leaders in modify-

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Cal.3d 244 (1984), determined that there was a triable issue of fact without applying a clear and convincing evidence standard. Had the clear and convincing evidence standard been used by the appellate court in reviewing the summary judgments, the case would probably not have proceeded to trial. However, since the jury found that the allegedly defamatory statements were true and FISHER admitted her failure to demand written retraction of the other statement in issue, the results are support for dismissal on the ground that there are adequate non-federal bases for the judgment.

ing their demands and sought support for the union demands from the superintendent and the other Board members. A witness testified that FISHER loaded picket signs into a teacher's van after one of the rallies. The teachers cheered FISHER and the union president hugged her during a rally. FISHER denied any such interaction with the union president at this rally, but the photographs of the event belied her testimony. Although FISHER claimed that she did not threaten the school superintendent in a meeting attended by only FISHER and the superintendent, the jury heard both accounts, and chose to believe the school superintendent.

The trial court instructed the jury that the LARSEN campaigners had the burden of proving the truth of the allegedly defamatory statements. Despite this heavy burden, the LARSEN campaigners proved the truth of the challenged statements.[2] Consequently, there is an adequate non-federal basis for the verdict. In FISHER's continuing attempt to change through the judicial process what she lost in the political process, FISHER ignores the fact that twelve members of the community disbelieved her. In light of the jury's finding that the allegedly defamatory statements were true, there is no basis for further review by this Court.

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[2]It is unnecessary for this Court to determine whether FISHER should have had the burden of proof after *Philadelphia v. Hepps*, 475 U.S. ____, 89 L.Ed.2d 783 (1986) because the LARSEN campaigners sustained their burden of proving truth. Furthermore, there is no need for an independent review of the record because the jury did not reach the constitutional issues by finding that the allegedly defamatory statements were true.

C. FISHER's Failure to Comply With California Civil Code Section 48a Is an Adequate Non-Federal Ground for Dismissal

At the trial of the retraction defense concerning the statement that "Fisher has repeatedly said that she would support the striking teachers," FISHER admitted that she had failed to comply with the retraction statute. California Civil Code Section 48a states in pertinent part:

> Plaintiff shall serve . . . a written notice specifying the statements claimed to be libelous and demanding that the same be corrected.

FISHER testified in her deposition that she had made no request for retraction of the allegedly defamatory portion of the article. FISHER was subpoenaed to bring any written demand for retraction to a hearing, but FISHER failed to produce such a retraction and admitted that she did not believe she had ever demanded retraction of the statement in issue. At the trial, FISHER again admitted she had not made written demand for retraction of the statement.

Based on FISHER's undisputed admissions that she had not complied with the retraction statute, the court necessarily granted judgment for THE COPLEY PRESS, INC. and MICHAEL SCOTT-BLAIR because FISHER had no special damages. *Fisher v. Larsen,* 138 Cal.App.3d 627, *cert. denied,* 464 U.S. 959 (1983).

This Court should dismiss the case on the basis that the judgment in favor of these Appellees rests on an adequate non-federal ground, FISHER's admitted failure to comply with the California retraction statute, Civil Code Section 48a.

II.

THIS COURT SHOULD DISMISS THE CASE ON THE GROUND THAT IT DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

A. There Is No Need for the Court to Find an Implied Right to Reputation in the Constitution

FISHER seeks to have this Court broaden the Constitution by finding an implied right to reputation as a part of the penumbra of First Amendment protections. That broadening of the Constitution is unnecessary for the reason that the case can be decided on non-constitutional grounds — truth of the statements and failure to comply with a state statute. Therefore, there is no reason to have this case determine whether the Court should further broaden implied First Amendment rights.

B. There Is No Basis to Drastically Limit the Right to Express An Opinion

This case involves political candidates expressing their political views in the midst of a hotly contested election. Even in political speech, FISHER seeks to have this Court limit the express constitutional protection of free speech and drastically change the right to express an opinion. FISHER disagrees with Justice Powell's statement in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974) that:

> Under the First Amendment, there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.

Justice Powell's statement is correct. The history of political speech in the United States has been punctuated by instances of caustic and vehement rhetoric. See *Desert*

Sun Publishing Co. v. Superior Court, 97 Cal.App.3d 49, 51-53 (1979). The Court in *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964) recognized the value to society that debate on public issues be uninhibited, open and robust. FISHER's attempt to radically limit the First Amendment right of free speech is unwarranted and fails to raise a substantial federal question.

C. The State Retraction Statute Is Constitutional

1. The Retraction Statute Satisfies the Due Process Clause

The Constitution permits the Legislature to limit tort recoveries, so long as the legislative action bears a rational relationship to the objective sought to be achieved. *Werner v. Southern California Associated Newspapers,* 35 Cal.2d 121, 125 (1950), *appeal dismissed,* 340 U.S. 910 (1951). The retraction statute, California Civil Code Section 48a, bears a rational relationship to the objective of the statute.

The *Werner* court identified two bases on which the Legislature could reasonably conclude that Section 48a could limit recovery to special damages absent a written demand for retraction: (1) the dangers of excessive recoveries of general damages in libel actions and (2) the public interest in free dissemination of the news. Each rationale remains valid after *New York Times v. Sullivan.*

By requiring a potential plaintiff to demand a retraction from a publisher, Civil Code Section 48a protects a newspaper from the expense of litigation and the chilling effect of general or punitive damages by providing an opportunity to retract the publication. *New York Times v. Sullivan* has not eliminated the need for this protection.

Even with the malice requirement under *New York Times v. Sullivan,* publishers still face the problem that

some plaintiffs may bring meritless suits with the hope that a "deep-pocket" publisher might settle rather than bear the time and expense of a lengthy lawsuit. *New York Times v. Sullivan* does little to cure this problem. But Civil Code Section 48a, by requiring a retraction within a certain period, diminishes the number of such suits by reasonably limiting the time in which plaintiffs can seek a retraction and the amount which may be recovered.

As the court stated in *Werner v. Southern California Associated Newspapers*, 38 Cal.2d at 128:

> The Legislature may reasonably conclude that the public interest in the dissemination of news outweighs the possible injury to a plaintiff from the publication of a libel, and may properly encourage and protect news dissemination by relieving all but special damages resulting from defamation.

Civil Code Section 48a also protects the individual by providing the newspaper with an incentive, the limitation of damages, to issue a retraction in an appropriate case. A prompt retraction may be more important to a public figure than a potential judgment through litigation. Additionally, the state has a legitimate interest in encouraging settlements. *American Motorcycle Assn. v. Superior Court*, 20 Cal.3d 578, 603 (1978).

Since the Legislature could reasonably conclude that the retraction statute is rationally related to several legitimate state interests in encouraging the free dissemination of news, avoiding protracted litigation and promoting settlements, the retraction statute satisfies the due process clause.

2. The Retraction Statute Satisfies the Equal Protection Clause

There are rational bases for the classification set forth by California Civil Code Section 48a. The Legislature

could reasonably conclude that newspapers and radio stations are likely targets of defamation suits. To encourage the free dissemination of the news, the Legislature could reasonably determine that the retraction statute is necessary to prevent excessive recoveries and the chilling effect of protracted litigation.[3]

Additionally, the Legislature could reasonably conclude that retraction is more effective if widely circulated by a newspaper or radio station than if circulated by an individual. As stated by one court:

> Now, as far as vindication of character or reputation is concerned, it stands to reason that a full and frank retraction of the false charge, especially if published as widely and substantially to the same readers as was the libel, is usually in fact a more complete redress than a judgment for damages. *Allen v. Pioneer Press Company*, 40 Minn. 117, 124, 41 N.W. 936 (1889).

Moreover, newspapers are subject to an increased risk because of the frequency of publication, the deadlines, and the collection of information from varied sources. Note, *First Amendment Protection Against Libel Actions: Distinguishing Media and Non-Media Defendants*, 47 So.Cal.L.Rev. 902, 932 (1974).

The retraction statute does not eliminate the right to bring suit for damages. If a timely request for retraction is made by an individual, and denied, there are no limitations on damages. If there is no timely request for a retraction, the individual may still sue for special dam-

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[3]The Legislature has limited tort recoveries in other settings which have survived constitutional attack. See, e.g. *Fein v. Permanente Medical Group*, 38 Cal.3d 137 (1985) (limitation of noneconomic damages in medical malpractice actions), *Cory v. Shierloh*, 29 Cal.3d 430 (1981) (civil immunity for certain providers of beverages).

ages. Thus, the classification is constitutional under the equal protection clause since the Legislature could reasonably conclude that there are rational bases for the retraction statute.

D. The Court Should Dismiss the Case

On the basis of the foregoing, Appellees respectfully request that this Court dismiss the appeal on the grounds that there are adequate non-federal bases for the judgment and that the case fails to present a substantial federal question worthy of this Court's review.

MOTION TO AFFIRM

Alternatively, Appellees move to affirm the judgment on the grounds that the decision is correct. FISHER had a fair and impartial trial on the issues and lost. The jury evaluated her credibility and found that the allegedly defamatory statements were true. The trial court heard FISHER's admission that she failed to demand retraction of the statement in issue. The appellate court "read, reread, and scrutinized the record" and "concluded that the criticism of Judge Fargo who has patiently presided over these proceedings for several years is totally baseless." See A-31. Years have passed since the 1977 school board election. It is time for this Court to finally conclude the protracted litigation over this political debate and affirm the judgment in favor of Appellees.

Respectfully submitted,

MARILYN L. HUFF
Counsel for Appellees
The Copley Press, Inc. and
Michael Scott-Blair

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On December 16, 1986, I served the within Motion to Dismiss or Affirm in re: "Julie Fisher v. The Copley Press Inc.," in the United States Supreme Court, October Term 1986, No. 86-799;

on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

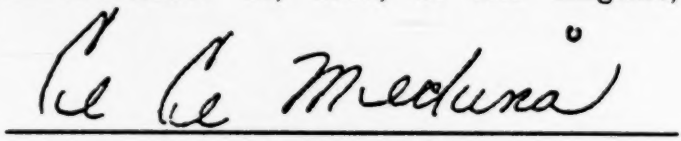
Julie Fisher, In Pro Per
3726 Charles Street
San Diego, CA 92106

Oscar Irwin
Hillyer and Irwin
530 B Street, Suite 1400,
San Diego, CA 92101

All Parties required to be Served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on December 16, 1986, at Los Angeles, California



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